

Appearances

IN THE MATTER OF
H. J. HEINZ CO., ET AL.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket 5994. Complaint, May 21, 1952—Decision, June 29, 1956*

Order requiring eleven corporate canners of raw tomatoes and their trade association to cease boycotting a cooperative association of tomato growers and its members in the "Ohio tomato area," in carrying out which boycott they destroyed the tomato market for members of the co-op by refusing to purchase tomatoes from them, attempted to destroy the co-op by refusing to recognize or negotiate with it as the marketing agent of its grower members, and effectuated the boycott by holding meetings to agree upon ways and means for maintaining a united front to combat and destroy the co-op.

Mr. Leslie S. Miller, Mr. William J. Boyd, Mr. Floyd O. Collins and Mr. Wilmer L. Tinley for the Commission.

Covington & Burling, of Washington, D. C., for H. J. Heinz Co., and various other corporations, and their officers thereof, and along with—

Reed, Smith, Shaw & McClay, of Pittsburgh, Pa., for H. J. Heinz Co., Joseph J. Wilson, Howard E. McKinley, Everitt E. Richard and Cyril P. Roberts;

Marshall, Melhorn, Block & Belt, of Toledo, Ohio, for Campbell Soup Co., Joseph Campbell Co., Walter A. Scheid, Edgar W. Montell and Harold R. Collard;

Mr. G. Lincoln Lewis and Barnes, Hickam, Pantzer & Boyd, of Indianapolis, Ind., for Stokely Van-Camp, Inc., Herbert F. Krimendahl and A. A. Ehrman;

Holloway, Peppers & Romanoff, of Toledo, Ohio, for Foster Canning, Inc.;

Mr. Joseph R. Harmon, of Fullerton, Calif., for Hunt Foods of Ohio, Inc.;

True & Meyer, of Port Clinton, Ohio, for Lake Erie Canning Co. of Sandusky, J. Weller Co. and George Wenger;

Mr. Carl C. Leist, of Circleville, Ohio, and *Ham & Ham* of Wauseon, Ohio, for Winorr Canning Co.

Marchal & Marchal, of Greenville, Ohio, for Beckman & Gast Co., Inc., Greenville Canning Co., Inc., St. Mary's Packing Co., Inc., Robert H. Timmer, Thomas G. Timmer, Luke F. Beckman and Charles F. Stemley.

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Avery & Avery, of Bowling Green, Ohio, for Buckeye Canning Co., Inc.

Estabrook, Finn & McKee, of Dayton, Ohio, for Gibsonburg Canning Co., Inc. and St. Mary's Packing Co., Inc.

Fuller, Harrington, Seney & Henry, of Toledo, Ohio, and *Mr. Joseph R. Harmon*, of Fullerton, Calif., for Hunt Foods, Inc. and Hunt Foods of Ohio, Inc.

Short & Dull, of Celina, Ohio, for Sharp Canning Co.

Gebhard & Hogue, of Bryon, Ohio, for Richard C. Boucher.

Lusk & Shaw, of Wapakoneta, Ohio, for Henry A. Diegel.

Ham & Ham, of Wauseon, Ohio, for George W. Conelly.

ORDER DISMISSING COMPLAINT AS TO CERTAIN CHARGES
AND AS TO CERTAIN RESPONDENTS

INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

This proceeding came on to be considered by the above-named Hearing Examiner theretofore duly designated by the Commission, upon the complaint of the Commission, the answers of respondents, testimony and other evidence introduced in support of the allegations of the complaint, and motions of counsel for all respondents to dismiss the complaint at the conclusion of the taking of testimony in support of the allegations of the complaint on the ground that insufficient evidence has been adduced in support of the allegations of the complaint. These motions and briefs in support thereof were filed in September 1953. Thereafter, in December 1953, counsel in support of the complaint filed answer and brief opposing respondents' motions and the matter was argued orally before the Hearing Examiner on January 7, 1954.

The complaint in this proceeding alleges, among other things (Paragraph 10), that respondents had been and now are engaged in unfair methods of competition in that they have entered into an understanding, agreement and combination to restrain trade in interstate commerce in raw tomatoes and that, as a part of said understanding, agreement and combination, have engaged in a planned common course of action:

1. To boycott, and in boycotting, the growers of tomatoes, in Ohio and in the adjoining and contiguous portions of Michigan and Indiana, who are members of the said cooperative growers association, Cannery Growers, Inc.;

2. To prevent, and in preventing, competing purchasers from buying raw tomatoes from growers who are members of Cannery Growers, Inc.;

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3. To destroy, and in the destruction of, the tomato markets of growers who are members of Cannery Growers, Inc., by agreeing and resolving not to purchase tomatoes from said growers;

4. To destroy, and in the destruction of, the said cooperative growers association, Cannery Growers, Inc., by refusing to recognize or negotiate with it as the marketing agent of its grower members;

5. To make effective, and in effectuating, the boycott, held meetings following the organization of Cannery Growers, Inc., to discuss, devise, and agree upon ways and means for forming and maintaining a united front among themselves to combat, defeat and destroy the said cooperative growers association;

6. To contact and police, and in contacting and policing, respondent processors to discourage them from purchasing tomatoes from growers who are members of said cooperative growers association;

7. To attempt to induce, and in attempting to induce, some of the said growers into breaching their respective contracts of membership with said cooperative growers association;

8. To fix and establish, and in fixing and establishing, prices to be paid by respondent processors to the growers for their raw tomatoes; and

9. To adopt and use, and in adopting and using, as a part of the aforesaid understanding, agreement and combination to fix and establish prices, a price leadership plan whereby respondent, H. J. Heinz Company, respondent Campbell Soup Company, or respondent Joseph Campbell Company, or two or more of said respondents, at times have led in the announcement and publication of their price or prices for raw tomatoes, after which, pursuant to mutual understanding among all respondent processors, the other respondent processors adopted, announced, published and followed the same prices.

Upon a careful consideration of all the oral testimony and written evidence in the record, the undersigned Hearing Examiner is of the opinion that there is not sufficient competent evidence in the record to support the allegations of subparagraphs 2, 6, 8 and 9 of Paragraph 10 of the complaint as to any or all of the respondents named in the complaint. The preponderance of the evidence indicates that the prices announced at the meetings of the respondent processors were prices already independently published by them and there is not sufficient evidence of uniformity of such prices to indicate, *prima facie*, that they were the result of agreement between the processors.

On the other hand, it is believed that there is sufficient competent evidence in the record to support the allegations of subparagraphs 1, 3, 4, 5 and 7 of Paragraph 10 of the complaint as to all of the

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respondent's with the exception of the respondent Ohio Cannery Association, its officers and directors, including Paul Hinkle, Secretary; also respondent Albert F. Dreyer, Secretary of Indiana Cannery Association, and certain small processors hereinafter named. In arriving at this opinion the undersigned Examiner is unable to find sufficient competent evidence in the record indicating that respondent Ohio Cannery Association or respondent Hinkle were responsible for the meetings attended by respondent processors in March and April 1951 at which discussions took place with respect to the cooperative growers association. Although respondent Hinkle called the meeting of respondent Ohio Cannery Association held on April 13, 1951, there is insufficient evidence of his prior knowledge of, or presence at, the meeting of tomato processors on the afternoon of that date at which discussions were had concerning the cooperative growers association.

With respect to the small processors hereinafter named, there is a failure of proof as to their connection with the alleged conspiracy. Some of the processors are located in southern Ohio and were never contacted by representatives of the growers association and others were not represented at the meetings. One contracted with the growers as usual with the approval of the cooperative growers association. Accordingly,

It is ordered, That the complaint in this proceeding as to the allegations in subparagraphs 2, 6, 8 and 9 of Paragraph 10 thereof be, and the same hereby is dismissed as to all respondents.

It is further ordered, That the entire complaint in this proceeding be, and the same hereby is, dismissed as to the following-named respondents:

The Ohio Cannery Association, Inc., incorporated as The Ohio Cannery Association;
Walter A. Scheid, individually, and as President of The Ohio Cannery Association, Inc.;
French Jenkins, individually, and as 1st Vice President of The Ohio Cannery Association, Inc.;
Paul Hinkle, individually, and as Secretary-Treasurer of The Ohio Cannery Association, Inc.;
Roy Irons, individually, and as Assistant to the President of The Ohio Cannery Association, Inc.;
Paul Korn, Norman M. Spain, Karl Hirzel, and Leroy Wenger, individually, and as Directors of The Ohio Cannery Association, Inc.;
Albert F. Dreyer, individually, and as Secretary-Treasurer of Indiana Cannery Association, Inc.;
Beckman & Gast Co., Inc.;

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Buckeye Canning Co., Inc.;
Greenville Canning Co., Inc.;
St. Mary's Packing Co., Inc.;
Charles F. Boucher, individually, and as a copartner in the partnership of Bryan Canning Co.;
Richard C. Boucher, individually, as a copartner in the partnership of Bryan Canning Co., and as a Director of The Ohio Cannery Association, Inc.;
George A. Hathaway, individually, as the present sole owner, and formerly as a copartner in the partnership of Home Canning Co.;
Lawrence B. Hall, individually, and as a former copartner in the partnership of Home Canning Co.;
Robert H. Timmer, individually, and as a copartner in the partnership of Tip Top Canning Co.;
Thomas G. Timmer, individually, as a copartner in the partnership of Tip Top Canning Co., and as 2nd Vice President of The Ohio Cannery Association, Inc.;
Henry A. Diegel, individually, and trading under the name and style of Diegel Canning Co.;
Luke F. Beckman, individually, and trading under the name and style of Minister Canning Co.;
Charles F. Stemley, individually, and trading under the name and style of Stemley Canning Co., and as a Director of The Ohio Cannery Association, Inc.

ORDER DENYING APPEAL FROM INITIAL DECISION

This matter coming on to be heard by the Commission upon the appeal of counsel in support of the complaint from that portion of the initial decision of the hearing examiner dismissing the price fixing allegations contained in subparagraphs 8 and 9 of Paragraph 10 of the complaint herein, and the respondents' briefs in opposition to said appeal; and

The Commission having considered the entire record, including the exceptions raised by counsel in support of the complaint, and having determined that the hearing examiner's initial decision was correct:

It is ordered, In conformity with the written opinion of the Commission being issued simultaneously herewith, that the appeal of counsel in support of the complaint be, and it hereby is, denied.

It is further ordered, That the case be, and it hereby is, remanded to the hearing examiner for further proceedings in regular course.

Commissioner Carretta not participating.

OPINION OF THE COMMISSION

By GWYNNE, Commissioner:

Respondents include 24 companies engaged in the processing of tomatoes in Ohio, the Ohio Cannery Association, Inc. (a trade association), individuals who are officers, directors, employees, or owners of the above companies, and officers or directors of the Ohio Cannery Association, Inc. or the Indiana Cannery Association (also a trade association).

Briefly stated, the complaint charges respondents with violation of Section 5 of the Federal Trade Commission Act by entering into an understanding, agreement and combination to restrain trade in interstate commerce in raw tomatoes, and as a part of said understanding, with engaging in a planned common course of action to, first, boycott and otherwise illegally interfere with said tomato growers, and second, to fix and maintain prices to be paid for raw tomatoes.

At the conclusion of the evidence in support of the complaint, the hearing examiner dismissed the entire complaint as to the Ohio Cannery Association, Inc., its officers and directors, the secretary-treasurer of Indiana Cannery Association, Inc., and certain canning companies and individuals named in the initial decision. He also dismissed the complaint as to the allegations in Subparagraphs 2, 6, 8 and 9 of Paragraph 10 as to all respondents. Counsel supporting the complaint appealed from the decision only insofar as it dismissed the allegations in Subparagraphs 8 and 9 of Paragraph 10 as to the "remaining respondents," that is, the respondents not included in the list set out in the initial decision as to whom the complaint was dismissed in its entirety. The appeal was submitted on written briefs without oral argument.

The only question involved in this appeal has to do with the sufficiency of the evidence to make a prima facie case as to the following allegations in Paragraph 10 of the complaint:

"The respondents herein have been, and are now, engaged in unfair methods of competition and unfair acts or practices in commerce, as 'commerce' is defined in the Federal Trade Commission Act, in that they have entered into an understanding, agreement and combination to restrain trade and interstate commerce in raw tomatoes. The respondents, as a part of the aforesaid understanding, agreement and combination, have engaged in a planned common course of action:

* * * * *

8. To fix and establish, and in fixing and establishing, prices to be paid by respondent processors to the growers for their raw tomatoes; and

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9. To adopt and use, and in adopting and using, as a part of the aforesaid understanding, agreement and combination to fix and establish prices, a price leadership plan whereby respondent, H. J. Heinz Company, respondent Campbell Soup Company, or respondent Joseph Campbell Company, or two or more of said respondents, at times have led in the announcement and publication of their price or prices for raw tomatoes, after which, pursuant to mutual understanding among all respondent processors, the other respondent processors adopted, announced, published, and followed the same prices."

All of the companies included among the remaining respondents operate tomato processing plants in Ohio. Most of the raw tomatoes to be processed are bought from individual growers under written contracts entered into just prior to the planting season, although some are bought later on the open market from growers or brokers. It is the practice for individual processors to announce their prices shortly before contracts are offered to the growers. In determining its opening price, each processor takes into consideration many circumstances, often including prices already announced by other processors.

Late in 1949, certain tomato growers formed a cooperative organization known as Cannery Growers, Inc. Under the contract between Cannery Growers, Inc. and its members, the cooperative was designated as the sole agent of the members to negotiate contracts with the processors for the growing and selling of tomatoes and the members agreed not to enter into a contract with any processor unless such contract had previously been approved by Cannery Growers, Inc.

In January 1951, Cannery Growers, Inc. notified the processors that it was ready to negotiate contracts in behalf of its members at a price of \$40-\$34, that is, \$40 per ton for U.S. Government Grade 1, and \$34 for Grade No. 2. Most of the processors did not negotiate with the cooperative for various reasons, among which was that the asking price was too high. Early in 1951, various processors announced their prices and began the effort to sign up growers. The prices announced by some processors were identical. For example, Joseph Campbell Company (buying agent for Campbell Soup Company), H. J. Heinz, Hunt Foods, Inc., and Winorr Canning Company, announced \$33-\$21. Other opening prices varied from \$36 to \$33 for Grade No. 1 and from \$26 to \$20 for Grade No. 2.

In their appeal brief, counsel supporting the complaint "do not contend that the record establishes that the prices announced at the meetings were agreed upon in advance by the respondent companies; nor * * * that the record establishes that there was uniformity among the respondents as to those prices or as to prices they actually paid for tomatoes." They do contend, however, that there was cooperation

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and agreement among the respondents to adopt and adhere to the prices previously announced by certain of them and that such cooperation and agreement was for the purpose of negotiating with the growers for advance contracts during the critical period, that is, the "contracting season." In other words, the claim is that there was concerted action to adhere to the prices individually announced (even though different) to further the boycott of Cannery Growers, Inc.

The record in the case is very voluminous both in regard to the allegations of boycotting and price fixing. The evidence shows that meetings were held on March 17, March 31, and April 13, of 1951, at which most of the respondents were represented. At these meetings, many things of mutual interest were discussed and some mention was made of prices already announced by some processors. Among the many exhibits are letters from the manager of the Toledo, Ohio, plant of respondent Hunt Foods, Inc., to his immediate superior giving a running account of the situation as the local manager observed it. After the opening price announcements, some processors changed their prices. For example, after announcing \$33-\$21 in March, Hunt Foods, Inc., went to \$34-\$22.50 in April, and to \$36-\$26 in May. Other respondents also made changes, although some did not occur until after the normal contracting season was over.

The hearing examiner held that there was not sufficient competent evidence in the record to support the allegations of Subparagraphs 8 and 9 of Paragraph 10 of the complaint. After considering the record, we conclude that the hearing examiner decided this issue correctly.

The appeal is therefore denied and it is directed that an order issue accordingly.

Commissioner Carretta did not participate herein.

INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

PRELIMINARY STATEMENT

Respondents herein are engaged in purchasing raw tomatoes and processing same into tomato food products, such as canned tomatoes, tomato juice, tomato puree and tomato catsup, with their processing plants located in the States of Ohio, Indiana, Illinois, and Pennsylvania.

On May 21, 1952, the Federal Trade Commission issued its complaint against 18 corporations, their officers and directors, and a number of individuals operating as partnerships engaged in the tomato processing business and also the Ohio Cannery Association, Inc., a trade association, its officers and directors, and the Secretary-Treasurer of the Indiana Cannery Association, Inc., charging them with having violated Section 5 of the Federal Trade Commission Act by

entering into an understanding, agreement and combination to restrain trade in interstate commerce in raw tomatoes, and, as a part of such understanding, agreement, and combination, with engaging in a planned common course of action to boycott and otherwise illegally interfere with tomato growers located in the northwestern portion of Ohio, the southern part of Michigan, and northeastern Indiana, generally referred to as the Ohio tomato area, from whom they purchased raw tomatoes; and, to fix and maintain prices to be paid for raw tomatoes. After answers were filed generally denying the allegation of the Commission's complaint, hearings were held in the States of Ohio and Indiana, at which oral testimony and other evidence was received in support of the allegations of the complaint. Thereafter, counsel for respondents filed motions to dismiss the complaint in September 1953, which motions were opposed, briefed and argued before the hearing examiner, who rendered his first initial decision February 16, 1954, dismissing the complaint as to all of the respondents except the following: H. J. Heinz Company; Campbell Soup Company; Joseph Campbell Company; Stokely Van-Camp, Inc.; Bauer Cannery, Inc.; Foster Canning, Inc.; Gibsonburg Canning Company, Inc.; Hirzel Canning Company; Hunt Foods, Inc., and its subsidiary, Hunt Foods of Ohio, Inc.; Lake Erie Canning Co. of Sandusky; Sharp Canning Co.; J. Weller Company; Winorr Canning Company, and certain officers and employees of the said corporate respondents. (All reference to respondents hereinafter made will refer to said respondents.)

The hearing examiner, also, in his first initial decision dismissed certain allegations of the complaint, particularly those allegations having to do with the fixing of prices to be paid growers for their raw tomatoes and the allegations with respect to preventing competing purchasers from buying raw tomatoes from certain growers. (The Commission affirmed the initial decision of the hearing examiner and remanded the case to him for procedure in the regular course on August 10, 1954.) So that there remains for consideration in this decision only the boycott charges.

Specifically, the charge under consideration is that these remaining respondents, through agreement, understanding, and planned common course of action, boycotted an association of tomato growers, namely Cannery Growers, Inc., hereinafter referred to as "Co-op," and its grower members and that in carrying out said boycott, the respondents (a) destroyed the tomato market for members of the Co-op by refusing to purchase tomatoes from them; (b) attempted to destroy the Co-op by refusing to recognize or negotiate with it as the marketing agent of its grower members; (c) effectuated the boycott by holding

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meetings following the organization of Co-op to discuss, devise and agree upon ways and means for forming and maintaining a united front to combat, defeat, and destroy the Co-op; and (d) attempted to induce Co-op members into breaking their membership contracts.

The taking of testimony in opposition to the allegations of the complaint began November 29, 1954, and was concluded January 4, 1955. Proposed findings were filed with the hearing examiner in March, 1955, and oral argument was had thereon on April 8, 1955. Consideration having been given by the undersigned hearing examiner to all the reliable, probative, and substantial evidence in the record, and upon all material issues of fact, law, or discretion, the following findings, conclusions, and order are hereinafter set forth.

FINDINGS OF FACT

I. Historical Background of the Tomato Processing Industry

For many years last past it has been the practice of the respondent processors, as well as of other processors in the Ohio tomato area, to negotiate contracts with individual growers for specific acreages of tomatoes before the tomato crop is actually planted, and in many instances to furnish the tomato plants for planting. On the basis of knowing the capacity of a given processing plant and with a knowledge of the potential yield per acre, respondent processors normally contract for substantially their entire tomato requirements in advance of the planting season.

The respondent processors usually begin contracting for their tomato acreage requirements in February, and such contracting is usually concluded by the early part of May each year. This period of time is generally referred to as the "contracting season." During this time the contracts are executed in one of or a combination of two ways: (a) the grower is notified and invited to come to the processor's plant or loading station, where he is advised of the price the processor is offering to pay, when he may enter into a contract to grow, harvest, and sell a specified acreage to the processor and the processor's agents to purchase and accept the tomatoes produced on the acreage specified in the contract, and (b) field men of the processor go out into the field and contact the growers and urge them to contract to grow, harvest, and sell tomatoes on specified tomato acreages for the processor. The amount of tomato acreage which a grower may contract to cultivate for a processor varies from as little as one or two acres to as much as 100 or more acres.

In the Ohio tomato area, tomatoes for processing purposes are usually produced from plants which are grown in the South, shipped

North by the processor, and sold to the growers, although in some instances the plants are home-grown plants. The plants are set out usually by the beginning of the month of May and all planting is concluded by the end of the first week in June, which period is known as the "planting season." The growers usually pay for the plants at the end of the harvest season when the processors deduct their cost from the proceeds to the grower for the tomatoes sold to the processors.

The larger processors employ field men, who, in addition to contracting with the growers for tomatoes for the processors, also maintain continuous contacts with the growers throughout the planting and growing seasons and advise the growers concerning the cultivation and harvesting of the tomato crop. They keep the growers fully advised concerning all circumstances and conditions connected with the production of the raw tomatoes, which service is helpful to the grower and enables the processor to maintain a degree of control over the quality of the tomatoes produced.

The tomato growing season in the Ohio area is from early May until the first frost, usually in the first week of October. The harvesting season, during which time the tomatoes are picked and hauled to the processor, begins about the middle of August and continues until the first frost. Raw tomatoes for processing purposes must be allowed to ripen on the plant because the color of the tomatoes is extremely important in determining the quality of the processed tomato products.

The processors agree to pay the growers for the tomatoes harvested from their acreage on the basis of a given price for all of the tomatoes that are graded U. S. No. 1, and another price for the tomatoes graded as U. S. No. 2, with no payment to be made for tomatoes graded as "culls." Another provision appearing in many of the respondent processors' contracts provides that the processor may reject the tomatoes or have them assorted, unless and until they grade at least 40 percent No. 1 tomatoes and contain less than 10 percent culls. Another usual provision of the contract prohibits the grower from producing any tomatoes not covered by the contract, thereby preventing the grower from contracting with more than one tomato processor each year.

Grading is performed at the time of delivery by the grower to the processor by Federal-State graders supplied by an inspection service which has been functioning in Ohio since about 1931. Grade-buying of tomatoes is essential to canners, growers, and consumers alike. The efficient grower benefits by receiving a higher price for the better quality tomatoes; the canner benefits because the quality of the raw

material is substantially reflected in the quality of the finished product. Finally, grading benefits the consumer by providing a greater assurance of quality products and better nutrition.

Prior to the year 1950, tomato growers in the Ohio area had nothing to say with respect to the contracts they executed with the respondent processors. They had no opportunity to negotiate concerning either terms or prices; they could accept or reject or else not grow tomatoes. It was a matter of either "take it or leave it." During the years immediately following the Second World War, particularly during 1948-49, the prices which the processors had been paying growers for raw tomatoes were considered by the growers to be unreasonably low. This condition, together with dissatisfaction in the grading of tomatoes, led a number of growers in the Ohio tomato area to organize Co-op, in October, 1949, to act as the bargaining agent or representative of the growers in that area in the negotiation of tomato contracts with tomato processors. The membership campaign by the Co-op and its representatives commenced in November 1949, and continued throughout the following year. A membership contract was employed under which the grower indicated how much tomato acreage he had planted in the year prior to membership and the number of acres he intended to plant in the succeeding year. The contract also provided for the appointment by the grower of the Co-op as his sole agent for the purpose of marketing or contracting for the sale of all canning tomato crops to be grown by him or for him on lands owned or otherwise held by him while the contract remained in effect. It was provided that the contract would not become effective until the Co-op had made contracts with 65 percent of the growers of the Ohio tomato area.

On December 18, 1950, the Board of Directors of the Co-op declared the membership contracts operative and so notified the member growers, advising the growers that the contract with the Co-op would be applicable to the 1951 tomato acreage.

The organization of Co-op first came to the attention of the respondent processors in the fall of 1950 and was a subject of discussion at the meeting of the Ohio Cannery Association in December 1950. However, it first began to contact respondent processors with respect to the 1951 tomato acreage in a letter addressed to tomato processors on January 18, 1951, notifying the respondents of its existence and its purposes, and inviting respondent processors to take part in negotiations for contracts for that season. Receiving no reply to this letter, Co-op sent another letter to most of the respondent processors on March 9 and 10, 1951.

In the first letter the Co-op notified the processors that a negotiating committee had been designated and that the Ohio Farm Bureau Federation had been requested to furnish technical information and advice, and the suggestion was made that negotiation should begin as soon as possible so that the 1951 grower contracts could be signed. In the second letter it was stated that after a canner-grower contract is approved by Co-op, "you'll be expected to contact your grower for acreage as in the past." Further attempts were made by negotiating committees of the Co-op to contact respondent processors and negotiate contracts for grower members for the 1951 season. It soon developed, however, that there was opposition to the Co-op on the part of respondent processors. One of the conditions which apparently was the cause of such opposition was the requirement of the recognition of the Co-op as being authorized to speak or contract for its grower members and the agreement on the part of the processor to deduct a check-off of one percent from the amount due the grower and remit the same as Co-op.

During the usual contracting season, Co-op approved the contract of three processors, namely, Lutz Packing Company on April 26, 1951, and the respondents Sharp Packing Company and St. Mary's Packing Company. Co-op enlisted the assistance of the Ohio Farm Bureau Federation in the spring of 1951 in seeking to negotiate with respondent processors after its earlier efforts had been unsuccessful. A Mr. Wayne Schidaker of that organization endeavored by telephone to arrange a negotiating meeting or conference between a negotiating committee of the Co-op and respondents Heinz and Campbell, but his telephone calls were unanswered. He was successful, however, in arranging a conference early in May, 1951, between officials of respondent Stokely Van-Camp and George Wenger, and a negotiating committee of Co-op. No contract was negotiated at this conference. Finally, on May 26, 1951, the Co-op was successful in negotiating a contract with respondent Hunt of Ohio.

In addition, the aforementioned processors of Co-op entered into a contract with a brokerage firm of Alex. E. and William J. Toth, tomato brokers, with the understanding that the Toths would sell the tomatoes to the Morgan Packing Company, which had purchased substantial quantities of tomatoes in the Ohio tomato area from the Toths during the 1950 season. Contracts were entered into by the Toths with grower members of the Co-op for approximately 2500 acres of tomatoes. However, due to failure on the part of Morgan Packing Company to purchase in the Ohio tomato area in the 1951 season, the Toth contracts were not carried out.

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II. Cooperative Activities of the Respondent Processors to Boycott or Refuse to Deal With Co-op

A. Prior to March 17, 1951

The larger respondent processors, Heinz, Campbell, and Stokely, neither acknowledged nor made any effort to obtain further information about Co-op after receiving the letters written by Co-op in January and March, 1951. However, these letters were considered and widely circulated within the offices of these respondents.

Three of the smaller respondents, Bauer Cannery, Inc., Foster Canning, Inc., and Gibsonburg Canning Company, Inc., contacted Co-op for information after the letters were sent out, but no negotiations occurred. Another small processor, respondent Sharp Canning Co., engaged in negotiations with the local committee of Co-op and entered into contracts with the grower members of Co-op. However, due to some misunderstanding, although Sharp agreed to do so, no check-off was made.

B. The first meeting of respondent processors on March 17, 1951

On March 17, 1951, representatives of all respondent processors except Bauer and Weller attended a meeting of tomato processors held at the Commodore Perry Hotel in Toledo, Ohio. Individual respondents present included: Everitt E. Richard, representing Heinz; Harold R. Collard, representing Campbell; Walter E. Scheid, representing Campbell Soup; Samuel Hammond, Russell Kline, and A. A. Ehrman, representing Stokely Van-Camp; George Conelly, representing Winorr Packing Company; and George Wenger, representing the Lake Erie Canning Co. of Sandusky, who called the meeting and presided. The Co-op letter of March 10, 1951, was the principal matter of discussion at this meeting. It had been received by most of the respondent processors present. The Co-op and its activities and the problems various canners were having in contracting for acreage in their territories were discussed. Those in attendance were asked to state how they were making out on their acreage and whether they were getting their requirements. Many of the processors complained that they had been unable to get their acreage, some indicated the progress they had made, and others expressed concern that they might not obtain their acreage. Respondent Harold R. Collard stated that respondent Campbell had encountered difficulty in signing acreage. He went to the meeting "to find out what the impact was on the other people." Respondent Sharp told of his experience in signing up with Co-op. The matter of grading was also discussed at the meeting as one of the complaints of the growers. It was understood at the close of the meeting that another meeting would be held in a couple of weeks.

C. The second meeting of respondent processors on March 31, 1951

The second meeting of the respondent tomato processors was held at the Barr Hotel in Lima, Ohio, on March 31, 1951, and most of the respondent processors had representatives in attendance. They were Heinz, Campbell, Stokely, Gibsonburg, Hirzel, Hunt, Lake Erie, and Sharp. The following individual respondents were present: Harold R. Collard, representing Campbell; Everitt E. Richard, representing Heinz; Cyril P. Roberts, representing Heinz; Samuel Hammond, Russell Kline, and A. A. Ehrman, representing Stokely Van-Camp; and George Wenger, representing Lake Erie. The purpose of the meeting was to find out how the different processors were coming out in acquiring acreage which was an acute problem at that time. Reports of progress of various respondent processors in attendance were made by Everitt E. Richard, representing Heinz; Thomas M. Morris, representing Hunt; Harold R. Collard, representing Campbell; A. A. Ehrman representing Stokely; and Karl Hirzel. Mr. Collard reported some of the activities of Campbell to get growers interested in making contracts (steak dinners), that Campbell was still low on acreage, and had made no offer about \$33 for No. 1 and \$21 for No. 2. It appeared to be the consensus of opinion of those present that the processors were still "having resistance or lacked signers by certain growers who had been with them in previous years but now were members of the Cannery Growers, Inc." The matter of contracting with members of the family of a grower in order to avoid a breach of a member's contract was also considered, and it was suggested that the processors consult their lawyers as to the validity of the contract. None of the processors present indicated that they were going to have their contracts approved by the Co-op and no one suggested a solution of the problem might be to recognize the Co-op. Also no one said that they would not buy from members of the Co-op. Mr. Norris representing Hunt, in reporting to his superior, said: "From all outward appearances it looks as though no one is going to break the line." At the conclusion of the meeting, it was stated that another meeting would be held in two weeks and it was indicated that if no change had occurred, the processors were going to ask Mr. DiSalle of the Office of Price Stabilization to issue a public statement that the processors cannot collect anything above parity.

D. The third meeting of respondent processors on April 13, 1951

This meeting occurred at the close of a meeting of the Ohio Cannery Association and was called at the request of respondent Walter A. Scheid, for the purpose of discussing the situation existing between the processors and the growers, and only processors were present. All

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of the respondent processors and individual respondents were represented at this meeting. Mr. Norris, in reporting the meeting to his superior in the Hunt organization, stated:

A meeting was held last Friday in Lima, Ohio, to exchange thoughts on what should be done regarding tomato acreage . . . not much progress has developed in the past two weeks. The majority of them are standing on their original offer of \$33.00 and \$21.00. . . . (Cx-11-A & B)

At this meeting the representatives of respondent processors reported on their acreage that had been signed and the prices they were paying. Heinz reported that 30 percent of its acreage had been signed. Stokely, Hirzel, and Hunt were without contracted acreage because the Co-op had almost 100 percent membership among their growers (Cx-11-A, par. 7). The main topic of this special meeting was the Co-op and the legal aspects connected with it. At this meeting, Mr. Lutz of Lutz Canning Company (not a respondent) announced what he was going to do, as did some others (Tr. 1041-2). Respondent George Wenger, representing Lake Erie, was not present, but his son Leroy was in attendance and presided over the meeting. There was considerable discussion with respect to the legality of the membership contract between the grower and the Co-op and the one percent check-off in the contract. Mr. Alvin Moll, of respondent Stokely, read a legal opinion with respect to the legality of the contract and the possible legal complications involved if the processors attempted to influence growers to breach their contracts with Co-op. There was also further discussion with respect to possible legal complications with Co-op if processors secured contracts with other members of the family of the grower or someone other than the one who had signed with Co-op. Respondent Everitt E. Richard also read a legal opinion concerning the Co-op contract which had been obtained that day from a law firm in Toledo, Ohio. Some of the representatives of the processors stated that they were going to continue to try to contract for acreage without dealing with Co-op, and others said that they were going to raise their own acreage. Some of these representatives were asked whether they intended to recognize and negotiate with the Co-op, and they reported,

. . . that up to the present time that they did not have authority from their home office to meet with the Association [Co-op]; other canners would say they were going out and get the acreage or try and get the acreage without dealing through the Association. (Tr. 1603)

E. Activities of Respondent Processors between and after the meetings

Between the first and second and the second and third meetings, no tomato contracts were negotiated, and respondent processors continued to refuse to recognize or deal with the members of the Co-op.

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Mr. Norris reported to respondent Hunt officials in a letter dated April 6, 1951:

* * * I have spoken to George Wenger, owner of Lake Erie Canning Company, who has called these meetings, and he feels that we are on the right track.

Campbell Soup, H. J. Heinz, and a number more are still firm on their price of \$33.00 and \$21.00. Stokely at Curtice have not come out as yet. (Cx-9-A)

Mr. Norris also reported in another letter dated April 12, 1951:

Have spoken to competitive canners, and all believe that the grower is not giving any ground as very little acreage is being signed up. Stokely at Curtice has not announced a price as yet, and both H. J. Heinz and Campbell Soup swear they are going to stick to \$33.00 and \$21.00, but I cannot help feeling that someone is going to break the line as both the grower and the canner are becoming very uneasy. No canner in this area has met with the Association that we know of, and will let you know as soon as one does.

* * *

In the event that Campbell or Heinz should come out with a price over the weekend it is our understanding we are to offer the same. However, this does not mean if some small canner jumps the line that we will do the same. Will contact you by phone if this should happen. (Cx-10-A & B)

Following the meeting of April 13, respondent processors continued to "hold the line" and refused to recognize and deal with the Co-op although some of the respondent processors did confer with a negotiating committee of the Co-op.

On April 26, 1951, the Lutz Canning Company of Defiance, Ohio (not a respondent), a processor who recognized the Co-op, had its contract approved and obtained acreage by contracting with the Co-op grower members. Mr. Lutz attended the April 13 meeting and had walked out before it was concluded because he was "skeptical" of the procedure "we were taking there." He apparently had reference to "contracting with relatives and things of that nature" (Tr. 1070-71). This was the first tomato processor to "break the line" and deal with the Co-op, and Mr. Norris, in reporting the fact to his superiors in the Hunt organization in a letter dated May 2, 1951, stated that Lutz,

* * * had negotiated with the Association and agreed to deduct 1% of the gross receipts for the Association from the growers involved, and that the price was to be \$32.00 per ton * * * the item caused great concern among all the canners in this area and involved a lot of phone calling.

Mr. Norris, also, in reporting to his superior on April 30, 1951, enclosed a newspaper clipping from *The Toledo Blade*, announcing that the Co-op had approved the contract of the Lutz Canning Company at a flat price of \$32.00 per ton.

* * * The above company is the only one who has met with the Association, and about 50% of their growers belong to the Association, and they have agreed to deduct 1% of the receipts of the growers who are members. The Lutz Company contracts for about 300 Acres.

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The telephones have been busy today from different canners calling and we calling some regarding this article. As far as we can learn, they are not a very reliable company and a sloppy operator, and it is the opinion of the larger packers in this area to ignore this item.

Spoke to Richards plant manager of Heinz at Bowling Green, this morning, who stated he just finished talking to Campbell Soup at Napoleon. He states that Campbell Soup is not going to get excited about this article, and their price is still \$33.00 and \$21.00. Heinz are still firm on their price of \$33.00 and \$21.00, and Stokely has yet to announce a price. However, Richards stated that we could look forward to some smaller canners jumping the line this week as both canners and growers are becoming very anxious.

* * *

* * * We don't think it advisable to come out with a new price at this time because we feel sure it would have to have the approval of the Association, and feel they will not O. K. any until some of the other large canners fall in line.

Should we announce a higher price it may have the effect of strengthening the Association and would hold off, waiting for the other larger canners to follow. The way things look at present it is my guess that the price will end up about \$36.00 and \$26.00, and will call you when we feel we can make a recommendation. (Cx-111-A & B)

Mr. Norris enclosed a copy of the Cannery Growers, Inc., letter of April 27, 1951, which contained a reference to the approval of the "independent canners" contract at a price of \$35.70 which Mr. Norris interpreted as meaning \$32.00 plus \$3.70 covering the price of hampers which are furnished the growers.

Mr. Norris again, in reporting to his superior on May 4, 1951, stated:

Mr. Al. Ehrman of Stokely Foods at Curtice called early this morning telling us that his Main Office in Indianapolis called him last night told him to start out with a price of \$35.00 and \$25.00 and see what could be accomplished. They are starting out today and he promised to call and let me know tomorrow how they made out. He also stated that his Company called Heinz at Pittsburgh and Campbell Soup at Chicago and informed them of what they were going to do. [Cx-13-A]

Spoke to Richards of Heinz at Bowling Green yesterday looking for gossip and asked if he thought any of the larger canners would jump the prices that were already established. His answer was that he felt quite positive that Campbell Soup would stand firm, and as far as his Company went, if the others stood in line his Company would do the same, but if any were to break the line, like Campbell Soup, Stokely, or ourselves, felt sure that his Company would have to do likewise. (Cx-13-B)

Mr. Norris included in this letter a list of the processors and the prices that they had announced and the dates of the announcement in the Ohio tomato area.

Mr. Norris in his letter to his superior on May 11, 1951, stated:

George Wenger, owner of Lake Erie Canning Co., at Sandusky, called me yesterday and said that a Mr. Wayne Shedaker requested a meeting with him, after being refused by other canners, to discuss the tomato situation. He is either the

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attorney for the Farm Bureau or the Cannery Growers. They are having a meeting this afternoon at Sandusky and he believes that something should break in the next forty-eight hours. He also believes that Campbell and Heinz will announce a price of \$35.00 and \$25.00, with no recognition to the Association. Should they do this, we will follow. (Cx-112-A)

Mr. Norris reported to his superior on May 18, 1951, stating:

One of our plant growers, by the name of Montrie, was approached by the Association that if he came out with a price they would approve it. This is the same as the Toth deal, on Brown Road previously mentioned. Montrie called us and asked if we would be interested, and "thought he could contract for a price of \$33.00 delivered to our plant, deducting 1% for the Association, and charging a 5% overall for his services. This we believe is out, but thought it best to convey it to you.

A short time ago we received a telephone call from one of the officers of the Association, requesting us to meet with him and see if we could agree to give some recognition to the Association, stating that it was not a matter of price that they were striving for but just recognition. We do know that they have contacted Stokely in Curtice along the same lines as we have been in communication with them.

As far as we know, all canners in the area at present claim that they are not going to meet with the Association, and we feel quite confident that unless something is done in the very near future we are not going to get enough acreage to run this plant as the general attitude of all growers is that they will not sign any contract until the Association approves of it, and we believe that the Association is going to stick it out to the very end.

We believe that we were the first ones on this offer by Montrie and should we not take it up, believe he will offer it to other canners. (Cx-113)

It also appears that as late as May 23, 1951, the respondent Hunt, as well as the other processors, were still attempting to get growers to sign contracts without the approval of the Co-op (Cx-114-A & B).

Respondent Stokely on May 3, 1951, announced its tomato contracting prices were \$35 for No. 1 and \$25 for No. 2, which it will be noted was \$2 higher for No. 1 and \$4 higher for No. 2 than the other leading processors had been offering. As heretofore indicated, before doing so, respondent Stokely informed respondents Heinz and Campbell and on May 4 notified respondent Hunt (Norris) of the new prices (Cx-13-A). Respondent Stokely, after a week of attempting to contract for acreage at the new prices without recognition of the Co-op, so notified Mr. Norris (Cx-20-A), who in turn notified his superior in a letter dated May 9, 1951. At the same time Mr. Norris reported:

H. J. Heinz claim to have about 50% of their acreage signed, and the rumor is that Campbell Soup at Napoleon have about 30%. Both claim they will hold the price and will not bargain through the Association.

* * *

The Association has not approved any more contracts than the one of Lutz Canning at Defiance at \$32.00 flat. I believe that if any of the larger canners

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would announce their prices and agree to sign through the Association that the Association would O. K. a price of \$35.00 and \$25.00. If we could believe that Campbell, Heinz and Stokely will not meet with the Association, can see nothing but the breaking up of the Association. (Cx-20-B)

After the meeting of May 10, 1951, at George Wenger's office, hereinafter mentioned, a meeting of representatives of Stokely and the Co-op was held, at which everything was agreed upon including price and form of contract until the question of the check-off came up in the discussion, and the spokesman, Mr. William Kruger, vice president of respondent Stokely, refused to allow the check-off even though at that time such an arrangement was being observed by this respondent with a Wisconsin cooperative organization in another product (Tr. 245 and 250).

F. The George Wenger Hunting Lodge Meeting

On August 19, 1951, during the early part of the tomato harvesting season, representatives of a number of respondent processors met at George Wenger's hunting lodge in Sandusky, Ohio. Respondents represented at that meeting were Heinz, Hirzel, Hunt, Lake Erie, Weller and Winorr. They discussed, among other things, the tomato shortage problem and the tomato acreage which Alex. E. and William J. Toth, tomato brokers, had under contract with grower members of Co-op. It was known that the Toths had contracted approximately 2,500 acres of tomatoes and that they had no market for them. In discussing the situation, respondent George Wenger stated that although he was not in the market he would not buy any of the Toth tomatoes unless he could do so at \$5 a ton less than what was being paid the growers and that he would have to have a release from the growers. Respondent Richard also indicated a similar opinion except that \$3 a ton was the margin he said would be necessary. Mr. Norris, in reporting this meeting to the superiors in the Hunt organization, stated that those that were present agreed that they must have a written release from the growers before they would purchase from Toth, and "if our competitors stand by their intention, we look for some cheap tomatoes" (Cx-17-A & B). None of the respondents represented at this meeting purchased any tomatoes directly from the Toths during the 1951 season. However, respondents Campbell and Stokely bought substantial quantities of tomatoes from the Toth acreage through brokers and refused to recognize or deal with Co-op in doing so. Other leading respondent processors, such as Heinz, bought some tomatoes on the open market in the Ohio tomato area, but the bulk of their open market purchases were made from other processors in other areas.

G. Comparison of 1950-51 open market purchases by respondent processors

A comparison of the quantity of tomatoes processed during the 1950-51 season by the leading respondent processors shows that during the year 1951 the Heinz Company, for instance, purchased approximately 8,000 tons of tomatoes on the open market whereas in 1950 they purchased less than 500 tons. The Campbell Soup Company in 1951 purchased 8,560 tons on the open market and none in 1950. The Jos. Campbell Company of Chicago purchased 4,408 tons on the open market in 1951 and none in 1950. Stokely purchased approximately 2,700 tons in 1951 on the open market and none in 1950. Likewise, there were far more substantial inter-company shipments from other plants owned by these respondents in 1951 than 1950 (Cx-33, 34, 36, 156-A & B, 157-A & B, 175).

H. Alleged inducement of breaches of grower contracts with Co-op

Respondent processors, in their efforts to contract for tomatoes in the spring of 1951, allowed their field men to solicit for acreage with any growers who were willing to sign contracts. However, after the discussion at the meetings on the legality of the membership contracts with Co-op, some of the respondents issued definite instructions to their staffs that they refrain from any action that might be construed as inducing a breach of contractual relationship between the Co-op and the grower (Cx-42, 43; Tr. 787, 2974-7; 3456). It appears that a number of Heinz growers who were members of Co-op signed contracts with Heinz but they did not plant tomatoes. When Heinz learned that they were Co-op members, it advised them that they should not violate their Co-op contract (Tr. 2988-9).

Respondent Stokely canceled contracts it had signed with several growers without knowing of their Co-op membership upon being informed by the growers that they were members and upon their request that the contracts be canceled (Tr. 3938, 3948).

Respondent Campbell entered into contracts with some grower members of the Co-op (12 in all) in the spring of 1951 (Cx-40 and 98). There is, however, no evidence that any of these growers was a member of the Co-op at the time the contract with Campbell was signed or that at such time Campbell knew that any such grower was then a Co-op member.

There is no evidence in the record one way or another with respect to the activities of respondents Bauer, Gibsonburg, Hirzel, Lake Erie, Sharp, Weller, or Winorr with respect to this allegation.

III. Contentions of Respondents

It is contended generally by respondents that they did not conspire or agree upon any policy as to the Co-op but each respondent operating independently decided, for reasons of its own, not to negotiate with Co-op during the 1951 season. One of the contentions advanced is that the OPS regulations of the Office of Price Stabilization, which were effective in the year 1951 in respect to canned tomato products, would not allow the respondent processors to pay the prices asked by Co-op on behalf of its members at the beginning of the 1951 season. It is asserted in this connection that on January 26, 1951, General Ceiling Price Regulation No. 1 froze the price of canned foods at the level from December 19, 1950 to January 25, 1951, with the exception that processors were to be permitted to pass on the increases in the cost of raw tomatoes within certain limits, and that in February, 1951, these limits had taken form, and canners had been informed that they would be permitted to pass on to their customers an increase of only \$6.50 per ton in their sales price (the difference between the area parity price and the 1950 area average price). On this basis a processor, therefore, who had paid \$24 for No. 1's and \$14 for No. 2's in 1950 could pay only \$30.50—\$20.50 in 1951 unless he were able to absorb completely from his own profit margin any increase over the latter figures. It is also asserted that OPS made special efforts to see that processors and growers were informed of the forthcoming limits early in 1951. However, the facts are that the first press release in this connection was made on March 14, 1951, but it was not until June 1, 1951, that the Federal Register carried a copy of the Ceiling Price Regulation No. 42 for canned vegetables of the 1951 spring pack (Rx-18; Tr. 3743), and July 26, 1951, when it carried a copy of the Ceiling Price Regulation No. 55 for a large number of canned vegetables including tomatoes (Rx-19; Tr. 3745-6). According to this ceiling price regulation for tomatoes for the Ohio tomato area, the permitted cost increase was \$7.60 instead of \$6.50 as indicated in the preliminary release. This referred to tomatoes processed in July, 1951. It would, therefore, appear from the foregoing facts that while the processors may have had some premonition as to what would transpire, they had no definite knowledge until after the contracting season was over.

It is also asserted by the respondents that the Co-op attracted little interest on the part of the canners during 1950. However, Mr. Col-lard, manager of the agricultural department of respondent Campbell Soup Company, testified with respect to a strike or tie-up on one or two of Campbell's loading stations, "people who purported to be

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committeemen or officers of the Cannery Growers, came to our grading platform and asked to get on the platform; and that was the second time that I had heard of them. That was in September, 1950" (Tr. 3248). It also appears that Mr. Norris reported to his superior in the Hunt organization that in the fall of 1950 the Co-op was quite active in trying to straighten out grading controversies with the processors, and that it was through the efforts of the Co-op that most of the respondent processors made an adjustment in the price paid in the fall of 1950 by giving a bonus which increased the price paid to growers by \$2 per ton (Cx-102-A & B, 103-A & B, 104-A & B).

Some of the respondents had special contentions and these will now be discussed:

Campbell Soup Company

This respondent contends that it had determined prior to January 18, 1951, the date of the first Co-op letter to processors, that it would not do business with the Co-op; that this conclusion was reached when it learned of the terms of the Co-op contract under which the latter would be the sole agent for the marketing of tomatoes grown by its members. Campbell claims that, although it is not opposed to dealing with cooperatives as such, in the case of tomatoes it was necessary to deal directly with the grower without the intervention of third parties in order to get the necessary quality and yield, and its policy to this effect had been determined independent and without regard to what any other canner was doing or was planning; that once it had determined that Co-op was outside the scope of Campbell's operations, Campbell did not care whether every other canner in the area signed up with the Co-op.

As a matter of fact, Mr. Collard, vice president of this respondent and its spokesman on many occasions, testified that it was not until March 2, 1951, that he knew there was a problem created by Cannery Growers and when he was asked if he had resolved at that time that he would give recognition to Co-op he testified, "There was no reason up to that time for us to even consider, and I did not consider, the problem. I did not know it was a problem" (Tr. 3322). Furthermore, Mr. Collard himself attended a meeting of the processors on March 17, 1951, admittedly "to find out what the impact was with the other people" (Tr. 3333). He further testified that the principal problem was Cannery Growers in operation—"that was the focal point" of that meeting. There is also other evidence indicating that even subsequent to this time Campbell was interested in the actions and reactions of its competitors with respect to dealing with the Co-op. Telephone conversations between Campbell officials and representatives and other respondent processors also support this conclusion.

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Stokely Van-Camp, Inc.

It was contended by this respondent that it was willing to negotiate with the local committee of the Co-op in the spring of 1951 but that the price of \$40 and \$34 for tomatoes was entirely too high. The facts are, however, that representatives of Stokely and the committee of the Co-op were able to agree upon a price of \$35 and \$25, and negotiations were broken off or discontinued because Stokely would not agree to the check-off—this in spite of the fact that Stokely was buying peas in Wisconsin from a cooperative organization on an advance contract basis with check-off (Tr. 4248, 4250).

H. J. Heinz Company

It is contended by this respondent that its plant managers were instructed to deal with any committee representing their own growers and if negotiations were successful the plant managers were given authority to agree to a check-off of Co-op dues on an approved assignment form executed by each individual grower, and that although the Co-op was advised of this position no committee of Heinz growers was ever appointed. There is a direct conflict with respect to the last part of this contention, and there does not appear to be competent evidence to support it.

Hunt Foods, Inc., and Hunt Foods of Ohio, Inc.

It was first contended by Hunt Foods, Inc., that it is engaged in the purchasing and processing of tomatoes in the State of California only and that it had no tomato cannery in Ohio, Michigan or Indiana in 1951 and purchased no tomatoes in those states. It admitted that it owned over 90 percent of the stock of Hunt Foods of Ohio, Inc. There is no evidence in the record to contradict this contention, and it is believed in this connection that this respondent should not be held responsible for the activities of its subsidiary.

Hunt Foods of Ohio, Inc., contends that it has not cooperated with the other respondents in the alleged conspiracy, understanding, or planned common course of action, and that the vice president in charge of operations of this corporation, Mr. Irving Goldfeder, has sole authority and responsibility for the purchase of all tomatoes and that Thomas M. Norris, vice president and local Ohio plant manager during 1951, was entirely responsible to Irving Goldfeder and entirely subject to his instruction and directions, and that he [Norris] had no authority to make agreements, commitments, contracts or other obligations for Hunt Foods of Ohio, Inc., with its competitors. It is also contended that the information contained in the letters referred to herein consists of gossip and other information which Norris was

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required to report to Goldfeder, and it is also contended that as evidence of the lack of such agreement or planned common course of action this respondent had its contract approved by the Co-op and purchased substantial quantities of tomatoes during the 1951 season.

The contentions of respondent Hunt Foods of Ohio, Inc., are not entirely borne out by the evidence in the record. It is true that this respondent did, in the latter part of May at the end of the contracting season, complete negotiations with the Co-op and had its contract approved for that season. However, this action on its part was taken after Norris had attended meetings and had taken part in the various discussions, and, from some of the expressions made by him in the course of his correspondence with Mr. Goldfeder, it is quite apparent that Hunt did not act independent of the other respondent processors until the latter part of May, 1951. It is quite evident that Hunt cooperated with its competitors as long as it could do so without seriously endangering its own business by being deprived of a source of supply of tomatoes (Cx-110-A & B, 111-A & B, 112-A).

Gibsonburg Canning Company

This respondent contends that after it received the letter of January 18, 1951, it arranged a conference on January 28, 1951, at Maumee, Ohio, at the Farm Bureau Cooperative Building, and that at this meeting representatives of the Co-op stated that the price must be \$40 and \$34, and the negotiations terminated, and no attempt has been made by the Co-op to renew the negotiations. Gibsonburg was willing to negotiate and was willing to pay a reasonable price for tomatoes but it could not afford to pay \$40 and \$34. There is nothing in the record to contradict this contention, and the only evidence of participating in a conspiracy was the attendance at the meeting on March 17, 1951.

Sharp Canning Company

It is contended by the respondent that within 10 days after the receipt of the Co-op letter, Sharp negotiated with a committee of three of its growers, who represented to Sharp that they were the Co-op committee authorized to negotiate and contract for Co-op members; that contracts were executed between Sharp and each of such three growers on March 12, 1951, at a price of \$34 and \$20, and that Sharp secured its full 1951 requirements after negotiating similar contracts with other growers. It is further contended that Sharp agreed to deduct the 1% check-off if the growers would protect the company from legal liability by furnishing written authorization therefor. There is no evidence in the record to contradict the foregoing contentions of respondent Sharp. It is contended by the at-

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torney in support of the complaint that this respondent's contract had never been approved by the Co-op because the committee which called upon respondent Sharp lacked authority from the Co-op. It is not believed that the allegations of the complaint have been proved against this respondent.

IV. Relations between respondent processors and Co-op since 1951

In 1952, all of the respondent processors with the exception of respondent Campbell had their contracts with the growers approved by Co-op, and there appears to be a friendly relation between the members of the Co-op and respondent processors. In March, 1952, representatives of respondent Heinz conferred and negotiated with officials of Co-op two weeks before the Heinz contract prices were announced. When the prices were announced, the Co-op approved the prices in the Heinz contract. Thereafter, Heinz addressed a letter to Co-op, advising that the Heinz Company would deduct the check-off and remit the same to the Co-op for grower members who authorized such deductions. Mr. A. A. Ehrman of respondent Stokely negotiated with the Co-op in the spring of 1952 and had its contract approved. It addressed a letter to the president of the Co-op similar to the one sent by Heinz, confirming the results of the negotiations. Similar negotiations were continued during succeeding years.

CONCLUSION

From the foregoing findings of fact, it is concluded that the acts and practices of the respondent processors, except Sharp and Gibsonburg, beginning in the spring of 1951 and continuing through the remainder of the tomato contracting and harvesting season of that year, were performed pursuant to a common understanding and planned common course of action (a) to refuse to negotiate or deal with the Co-op as a bargaining agent for its grower members, and (b) to refuse to grant recognition of, or to negotiate with, the Co-op by deducting the dues check-off for grower members of that organization. In arriving at this conclusion, full consideration has been given to the contentions of respondent processors, and, while it is not "crystal clear," as asserted by counsel in support of the complaint, it is believed that the inescapable conclusion must be drawn from all of the facts disclosed, not only by what was said but what was done by the respondent processors, that they were acting pursuant to a common understanding or agreement. It is fundamental law, of course, that the essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealing or other cir-

circumstances as well as in an exchange of words.⁴ In this case, as in many cases, in order to establish agreement we are compelled to rely on inferences drawn from the course of conduct of the alleged conspirators. Counsel for respondents emphasize the fact that nearly all, if not all, of the respondent processors were opposed as a matter of policy to dealing with growers of tomatoes through a third party, or, as in this instance, with the selling agent Co-op. Assuming that this is true, such a policy would not justify the action taken by the principal respondents to enforce that policy. Each of the respondent processors, unless he consulted with the others, would not be aware of the policy of the competitors, and it would be only through an exchange of information, that the respondents could be sure that the position or stand taken by them could be sustained over any period of time. Even Campbell, who has vehemently claimed throughout this proceeding that it acted independently of all of its competitors, attended all meetings and there exchanged information as to conditions, and as to acreage and prices, with other respondent processors and also by telephone; so that each and all of the respondent processors not only knew the policy of their competitors but also the extent to which it was being carried out. It is significant that each of the principal respondents took the position in almost the same language in their testimony that they were willing to deal with the growers with whom they had been dealing, but they were all unwilling to negotiate with a committee which represented the Co-op. It is inconceivable that each of the principal respondents in this case would maintain that position if they did not know that the same position was being taken by their principal competitors. There is evidence that even though they all had the same common purpose they were suspicious of each other and were watching each other to make sure that their competitors observed the policy which they asserted they were following.

It is equally significant that at the last meeting of the respondents on April 13, 1951, those present were assured that the large processors had not yet given authority to their representatives to deal with the Co-op. It was not until it was quite apparent that the processors were not going to be able to get sufficient supplies to operate their plants that respondent Hunt of Ohio decided to "break the line" and negotiate a contract with the Co-op.

It is also significant that after the experience of the 1951 season, all of the respondent processors, with the exception of Campbell, freely negotiated with the Co-op early in 1952 and had their contracts

⁴ *United States v. Schrader's Son*, 252 U. S. 85.

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approved, and allowed the one percent check-off which had been the principal stumbling block to negotiations the previous year.

It is contended by counsel in support of the complaint that the conspiracy in this case began at the time of the first meeting on March 17 and continued throughout the remainder of the season. It is difficult to determine exactly when a conspiracy of this kind is started or begun. However, it is concluded that in this particular case the conspiracy or common course of action began when the respondent processors acquainted each other with what they proposed to do with respect to the Co-op. That might have taken place at the meeting of March 17 or it might have taken place before that time in the course of telephone conversations or other conferences not disclosed by the record. Be that as it may, the respondent processors became parties to the agreement or the planned common course of action when they learned of it and indicated or expressed, either by word of mouth or action, that they were in accord with the plan of operation. By the participation of each of the respondent processors in that course of action, each and everyone of them continued to be a co-conspirator so long as it acted in conformance to the plan. As the Supreme Court said in a decision involving similar charges:

It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan. * * *

It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. *Schenck v. United States*, 253 F. 212, 213, aff'd, 249 U. S. 47. * * *

Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act. * * *

Reference is made to the decision of the Supreme Court in *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., et al.*, 346 U. S. 537, which counsel for respondents rely upon as authority for their contention that the facts disclosed in this case do not indicate the existence of a conspiracy. In that case, the crucial question was whether the conduct of respondents stemmed from independent decision or from an agreement, tacit or express. It was conceded by the Court that business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. Citing the *Interstate Circuit* case, *supra*.

* * * But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior

⁵ *Interstate Circuit, Inc., et al. v. United States*, 306 U. S. 208.

⁶ *Idem*.

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itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely. * * * [Emphasis supplied.]

The uniform business behavior relied upon in that case was the refusal by each respondent to grant the petitioner, a moving picture exhibitor in the suburbs of Baltimore, first-run pictures for his theatre, each respondent stating that it had a policy of restricting first-run pictures in Baltimore to the downtown theatres, giving similar reasons. There was no other evidence such as appears in the present case as to meetings, telephone calls, etc., to show a course of action from which an agreement might be inferred. The case is authority for the proposition that parallel business behavior does not conclusively establish agreement in violation of the Sherman Act.

It is now well established by numerous court decisions that concerted action by competitors pursuant to an understanding or planned common course of action between and among them to boycott and refuse to deal with members of the trade, or, as in this case, with growers or common selling agents of growers, constitutes an unreasonable restraint of trade and an unfair method of competition under the Federal Trade Commission Act.⁷

It is also concluded that the Hunt documents, which have been quoted and relied upon in the foregoing findings, are competent evidence to be considered in proving the manner in which respondent processors carried out the common understanding and agreement found to exist.⁸

It is concluded that the allegations in the complaint with respect to the breaching of contracts between growers and the Co-op by the respondent processors have not been proven.

In view of the definite discontinuance of the foregoing acts and practices by the respondent processors before the complaint in this case was issued, and the fact that they have not been committed for more than four years since, and the strong position that the Co-op now occupies in the industry as a bargaining agent for its member tomato growers in the Ohio area, it is believed that the Commission would be justified in assuming from the facts disclosed that the respondents will not again attempt to engage in these acts and practices in this industry and therefore it would not be in the public interest for the Commission to issue an order to cease and desist at this time. In this connection, counsel in support of the complaint concedes that respondents probably will not renew their unfair acts and practices in Ohio again but urges there should be an order to

⁷ *Fashion Originators Guild of America v. Federal Trade Commission*, 312 U. S. 457.

⁸ *Wiborg v. United States*, 163 U. S. 632, 657.

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cease and desist to prevent them from engaging in those activities against any other growers organization.

It is not believed the respondents will soon forget the lesson learned in Ohio and try the same practices elsewhere. At any rate a dismissal of the complaint without prejudice will give the Commission an opportunity to proceed promptly with a new complaint if the respondents should attempt to use such methods again.

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

The complaint, under Section 5 of the Federal Trade Commission Act, charges respondents, among other things, with conspiring and engaging in a planned common course of action to boycott certain tomato growers. At the conclusion of the testimony in behalf of the complaint, the hearing examiner dismissed the charges as to all respondents except the following: H. J. Heinz Company; Campbell Soup Company; Joseph Campbell Company; Stokely Van-Camp, Inc.; Bauer Cannery, Inc.; Foster Canning, Inc.; Gibsonburg Canning Company, Inc.; Hirzel Canning Company; Hunt Foods, Inc., and its subsidiary, Hunt Foods of Ohio, Inc.; Lake Erie Canning Co. of Sandusky; Sharp Canning Co.; J. Weller Company, Winorr Canning Company, and certain officers and employees of the said corporate respondents.

As to the above-named parties, the hearing examiner dismissed all charges except those involving the boycott.

Upon appeal, the ruling was affirmed and the case was remanded for further hearing. At the conclusion of such hearings, the hearing examiner dismissed the complaint as to three respondents, namely, Gibsonburg Canning Company, Inc., Sharp Canning Company and Hunt Foods, Inc. As to the remaining respondents, the hearing examiner found that a conspiracy did exist but held that because of the termination of the illegal acts prior to the complaint and other circumstances, no order should issue. He accordingly dismissed as to them without prejudice.

Both sides appeal. The appeal of respondents (except the three dismissed with prejudice) is based on the finding by the hearing examiner that a conspiracy did exist. The appeal of counsel supporting the complaint challenges, first, the dismissal of the three respondents above named, and, second, the failure to issue an order.

Respondents are engaged in the processing of raw tomatoes into tomato food products. For many years prior to 1951, it has been their practice to enter into contracts with individual tomato growers for the planting and subsequent delivery of specified acreages of tomatoes.

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The contracting usually begins in February and is concluded in the early part of May. Prior to 1951, contracts were prepared by the individual respondents and usually covered such matters as prices to be paid for delivered tomatoes according to grade, number of acres to be planted, a requirement that the individual grower would sell to that particular respondent all tomatoes grown by him that year, etc. The contracts were not the result of individual negotiations. Each respondent at the proper time announced the price and general terms on which it would contract. The individual grower was free to contract with the canner of his choice, although geographic considerations put some limitations on this freedom. Canners also at times made purchases during the canning season on a "spot" or "open market" basis.

Dissatisfaction on the part of some growers with the prices paid by the canners and also with the grading program led to the organization in 1949 of a cooperative known as Cannery Growers, Inc. The general purpose of this cooperative was to act as the bargaining agent or representative of the growers in the negotiation of tomato contracts with the canners. Many growers became members and signed contracts appointing the cooperative as the bargaining agent and providing that the contract would not become effective until the Co-op had contracted with 65% of the growers in the Ohio tomato area.

Appeal of Respondents

In their appeal all the respondents with the exception of the three against whom the complaint was dismissed with prejudice challenge the findings and conclusions of the hearing examiner that the acts and practices of respondents beginning in the spring of 1951 and continuing through the remainder of the tomato season of that year were performed pursuant to a common understanding and planned course of action (a) to refuse to negotiate or deal with the Co-op as a bargaining agent for its grower members, and (b) to refuse to grant recognition of, or to negotiate with, the Co-op by deducting the dues check-off for grower-members of that organization.

There is no direct evidence of express agreement among the respondents. The hearing examiner based his conclusions on various acts and conduct of the respondents and inferences arising therefrom. These matters are set out in detail in the initial decision. They relate to (1) meetings of the respondents or some of them, (2) other relations between respondents, (3) letters written by Thomas M. Norris, Plant Manager of Hunt Foods of Ohio, Inc., and (4) other matters.

On December 18, 1950, the Co-op declared its contracts with growers were operative and sent letters notifying the growers and at least

some of the canners that the Co-op was prepared to enter into negotiations for 1951 contracts concerning prices, price spread between grades, check-off provisions, non-exclusive growing clause, and other matters. In a letter dated January 30 to the growers (also made available to the canners) asking prices were declared to be \$40 for Grade No. 1 and \$34 for Grade No. 2 tomatoes. Other proposed terms were set out and the growers were advised not to sign any contract that did not have the approval of the Co-op. Other letters were also sent at various times.

The letters advised of the appointment of a negotiating committee and stated that canner-grower contracts were to be approved by the Co-op before contracts were made with individual growers. Thereafter, further efforts were made to contact the canners and negotiate with them. With a few exceptions referred to later, no contracts were thus negotiated.

On March 17, 1951, a meeting of representatives of most of the respondents was held at a hotel in Toledo, Ohio. At this meeting, there was a general discussion covering the Co-op's letters, the difficulties individual canners were having in signing up acreage, etc. Another meeting, to be held in a few weeks, was agreed upon.

This second meeting was held on March 31 in Lima. At this meeting, there was further discussion of the general situation. Reports were made of the efforts being made to secure acreage and of the difficulties being encountered. The matter of contracting with some member of the family of a Co-op member was discussed and suggestions were made that individual members consult their lawyers as to the validity of such contracts.

A third meeting was held on April 13, 1951, at which there was a continuation of the discussions as to the Co-op. Some canners reported as to their acreage or lack of it. The legality of the Co-op membership contracts and the 1% check-off was also discussed. Legal opinions were read as to the possible consequences of attempts to influence Co-op members to breach their contracts with the Co-op and also as to the possible legal consequences of attempting to contract with members of the families of Co-op members.

There was a final meeting on August 19, 1951, during the harvest season at the hunting lodge of George Wenger of the Lake Erie Canning Company. While this meeting appears to have been primarily social, there was some discussion of the situation, particularly as to buying tomatoes from the Toths, tomato brokers who had contracted 2,500 acres with grower-members of the Co-op and who were apparently looking for a market. Conversations reported indicated

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an unwillingness on the part of some respondents to buy from Toths, except on certain conditions.

It also appears that during the tomato season, there was considerable telephoning and other contacts between various respondents in regard to the problems created by the Co-op.

Letters from Mr. Thomas M. Norris, Plant Manager of respondent Hunt Foods of Ohio, Inc. to his superior, Irving Goldfeder, vice-president of Hunt of California, are also in evidence. In these letters, Mr. Norris gave a report on the happenings shortly after they occurred. For example, in a letter of April 2, 1951, he reported the efforts of some canners to get their acreage and other matters. He concluded: "From all outward appearances, it looks as though no one is going to break the line." In a letter of April 6, 1951, he said: "I have spoken to George Wenger, owner of Lake Erie Canning Company, who has called these meetings and he feels that we are on the right track."

In a letter of April 12, 1951, he said:

Have spoken to competitive canners, and all believe that the grower is not giving any ground as very little acreage is being signed up. Stokely at Curtice has not announced a price as yet, and both H. J. Heinz and Campbell Soup swear they are going to stick to \$33.00 and \$21.00, but I cannot help feeling that someone is going to break the line as both the grower and the canner are becoming very uneasy. No canner in this area has met with the Association that we know of, and will let you know as soon as one does.

* * * * *

In the event that Campbell or Heinz should come out with a price over the weekend it is our understanding we are to offer the same. However, this does not mean if some small canner jumps the line that we will do the same. Will contact you by phone if this should happen.

At the third meeting (April 13), Mr. Lutz of the Lutz Canning Company walked out of the meeting, apparently because of disagreement with some things being said. On April 26, his company had its contracts approved by the Co-op and it began contracting with Co-op members. In regard to this, Mr. Norris wrote:

* * * The above company is the only one who has met with the Association, and about 50% of their growers belong to the Association, and they have agreed to deduct 1% of the receipts of the growers who are members. The Lutz Company contracts for about 300 acres.

The telephones have been busy today from different canners calling and we calling some regarding this article. As far as we can learn, they are not a very reliable company and a sloppy operator, and it is the opinion of the larger packers in this area to ignore this item.

Spoke to Richards, plant manager of Heinz at Bowling Green, this morning, who stated he just finished talking to Campbell Soup at Napoleon. He states that Campbell Soup is not going to get excited about this article, and their price is still \$33.00 and \$21.00. Heinz are still firm on their price of \$33.00 and

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\$21.00, and Stokely has yet to announce a price. However, Richards stated that we could look forward to some smaller canners jumping the line this week as both canners and growers are becoming very anxious.

In a letter dated May 18, 1951, Mr. Norris said:

A short time ago we received a telephone call from one of the officers of the Association, requesting us to meet with him and see if we could agree to give some recognition to the Association, stating that it was not a matter of price that they were striving for but just recognition. We do know that they have contacted Stokely in Curtice along the same lines as we have been in communication with them.

A letter dated May 9, 1951 contained this:

H. J. Heinz claim to have about 50% of their acreage signed, and the rumor is that Campbell Soup at Napoleon have about 30%. Both claim they will hold the price and will not bargain through the Association.

* * * * *

The Association has not approved any more contracts than the one of Lutz Canning at Defiance at \$32.00 flat. I believe that if any of the larger canners would announce their price and agree to sign through the Association that the Association would O. K. a price of \$35.00 and \$25.00. If we could believe that Campbell, Heinz and Stokely will not meet with the Association, can see nothing but the breaking up of the Association.

In addition to the Lutz Packing Company, contracts with Sharp Packing Company and St. Mary's Packing Company were approved by the Co-op. At a later date (May 26), the Co-op also negotiated contracts with respondent Hunt Foods of Ohio. There were also meetings and negotiations with other canners with whom contracts were not negotiated.

The open market purchases by respondents during the 1951 season also throw light on the subject. On this point, the initial decision points out:

A comparison of the quantity of tomatoes processed during the 1950-51 season by the leading respondent processors shows that during the year 1951 the Heinz Company, for instance, purchased approximately 8,000 tons of tomatoes on the open market whereas in 1950 they purchased less than 500 tons. The Campbell Soup Company in 1951 purchased 8,560 tons on the open market and none in 1950. The Jos. Campbell Company of Chicago purchased 4,408 tons on the open market in 1951 and none in 1950. Stokely purchased approximately 2,700 tons in 1951 on the open market and none in 1950. Likewise, there were far more substantial inter-company shipments from other plants owned by these respondents in 1951, than in 1950.

The Toths who had contracted 2,500 acres through the Co-op sold some tomatoes to three large respondents through other brokers—a deal which did not involve any recognition or dealing with the Co-op.

The respondents argue that the conclusions of the hearing examiner (1) are drawn exclusively from claimed parallel behavior, (2) fail to take into consideration whether respondents' policies accorded with

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their individual interest, and (3) based a finding of refusal to negotiate with the Co-op on the fact that they failed to agree on terms.

We do not so construe the initial decision. It appears that some respondents, for one reason or another, did not wish to deal with the Co-op. An individual respondent might properly conclude that dealing with the Co-op rather than the individual grower was not in accordance with the interests of the canner. Nor would the mere failure to agree upon terms of itself prove a failure to deal with the Co-op.

The basis of the complaint, however, is that the respondents engaged in a planned common course of action to boycott the Co-op. On that issue, the evidence has taken a wide range. We think that the hearing examiner decided this issue correctly. His findings thereon are adopted as the findings of the Commission and the appeal of respondents is denied.

Appeal of Counsel Supporting the Complaint

*(1) Dismissal of the complaint as to Gibsonburg Canning Company
and Sharp Canning Company*

Gibsonburg received the letter sent out by the Co-op on January 18, 1951. On January 28, representatives of respondent met with the Secretary of the Co-op at the Farm Bureau Cooperative Building at Maumee, Ohio, and there was some discussion of prices. The Secretary of the Co-op was asking \$40/\$34 which was not accepted. There apparently was no further offer or counter offer. It appears that a representative of respondent attended the three meetings of the processors.

A representative of Sharp Canning Company also attended the three meetings. Early in March, 1951, and after the notice from the Co-op, Sharp negotiated with a committee of three of its growers, who represented that they were the committee authorized to negotiate for Co-op members. Sharp thereafter secured its full 1951 acreage at a price of \$34 and \$21. There is evidence to the effect that the committee did not have actual authority to represent the Co-op. Sharp also agreed to deduct the 1% "check-off" if the growers individually gave written authorization. No such authorization was given. In subsequent years, authorization was given and the deduction was made.

The hearing examiner found that the evidence was not sufficient to prove the allegations of the complaint against the Gibsonburg Canning Company and Sharp Canning Company.

We agree with and adopt such finding. The appeal of counsel supporting the complaint as to this issue is denied.

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(2) *Dismissal of the complaint as to Hunt Foods, Inc.*

Respondent Hunt Foods, Inc. is a Delaware corporation with its principal place of business in California. In 1951 it had three subsidiaries: Hunt Foods of Utah, Inc., Hunt Foods of New Jersey, Inc. and respondent Hunt Foods of Ohio, Inc. Respondent Hunt Foods of Ohio, Inc. is a corporation organized under the laws of Ohio with its principal place of business in Toledo, Ohio. Prior to 1948, Hunt Foods of Ohio, Inc., was known as the Harbauer Company. In 1948, Hunt Foods, Inc., acquired a controlling stock interest in the Harbauer Company and the name was later changed to Hunt Foods of Ohio, Inc. In 1951, respondent Hunt Foods, Inc. owned 90% of the stock of respondent Hunt Foods of Ohio, Inc. Irving Goldfeder was a vice-president of all the corporations above named with an office in California. He was vice-president in charge of operations of respondent Hunt Foods of Ohio, Inc. and had sole authority and responsibility for the purchase of all tomatoes for respondent Hunt Foods of Ohio, Inc., during 1950, 1951 and 1952. Hunt Foods, Inc. neither purchased nor processed tomatoes during 1951 in any of the states with which this proceeding is concerned and did not participate in any of the activities charged in the complaint.

The question presented is whether Hunt Foods, Inc. can be held responsible for the activities of respondent Hunt Foods of Ohio, Inc.

Irving Goldfeder was twice called as a witness by attorneys supporting the complaint. He testified that he was executive vice-president of Hunt Foods, Inc. and also vice-president and director of Hunt Foods of Ohio, Inc.; that his duties and sole responsibility as an officer of Hunt Foods, Inc. were in "charge of production" (Comm. Ex. 21, p. 4); that in connection with both corporations, his supervisory and managerial functions were to "help plan the proper equipment, mechanics of the plant, the volume of production, supervise and advise on the purchasing of the supplies which go into production, and help supervise the actual production of the factory."

Q. What is the relationship between Hunt Foods of Ohio, Inc. and Hunt Foods, Inc.?

A. Well, it is practically wholly owned, it is held over 90% by Hunt Foods, Inc.

Q. And as a nearly wholly-owned subsidiary, who exercises the control over the management and operation of Hunt Foods of Ohio, Inc.?

A. Hunt Foods, Inc.

Q. Hunt Foods, Inc.?

A. Yes, sir. (Comm. Ex. 21, p. 5.)

* * *

Q. Under whose control are matters of policy with respect to the purchases of Hunt Foods of Ohio, Inc.?

A. Mine. (Comm. Ex. 21, p. 12.)

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Later, testifying as to the two corporations, Mr. Goldfeder said:

Q. Now, with reference to the two complaints, are they separate and distinct corporations?

A. They are. (Tr. 4006.)

Q. You control the operation of Hunt Foods of Ohio, Inc., do you?

A. I do.

Q. The Hunt Foods Company of California?

A. They control the stock; I directed the operations.

Q. You directed the operations?

A. That's right.

In regard to the two subsidiaries in New Jersey and Utah, Mr. Goldfeder testified:

Q. You direct the operations similar to the way you direct this one in Ohio?

A. I do.

He also testified that as vice-president of the Hunt Foods Company of Ohio, he had sole responsibility for purchasing of tomatoes and for plant operation. It was solely up to him. No one had that responsibility besides him. (Tr. 4008, 4012)

This general subject has often been considered by the courts. *Press Company, Inc. v. NLRB*, 118 F. 2d 1937, involves an appeal from an order requiring the Press Company, Inc. and Gannett Company, Inc. to cease and desist from certain unfair labor practices. All of the common and one-half of the preferred stock of Press Company was owned by Gannett Company. Three of Press Company's directors were also directors of Gannett Company. The offices of president, vice-president and secretary in each corporation were held by the same persons. The court pointed out:

There is unquestionably a close community of interest between the different papers, but there is no testimony that the Gannett Company ever exercised control of the internal operation of the newspaper published by Press Company * * *. A careful examination of the evidence shows a complete absence of any which ought to be accepted by reasonable minds tending to show that Press Company was not self-governing.

Reference of problems by Press Company "to Rochester" (the Gannett Company home office) should be construed as reference to its own offices rather than to the Gannett Company. Consequently, the ruling of the N.L.R.B. holding Gannett liable for the acts of Press Company was overruled.

In *Owl Fumigating Corporation v. California Cyanide*, 30 F. 2d 812, the court clearly expresses the general rule that ownership of capital stock of one corporation by another or identity of officers does not establish the relationship necessary to holding the parent company liable for the acts of the subsidiary. On the contrary, it is necessary to prove that the one corporation is a mere agency or department of

the other and is used as an instrumentality to perpetuate fraud, justify wrong, avoid litigation, or render it more difficult, or generally to escape liability for what are in substance its own acts.

In *National Lead Company v. FTC*, decided December 1, 1955, by the U. S. Court of Appeals, Seventh Circuit, the court, in reversing the Commission's order against Anaconda, said:

We have searched in vain for evidence of a substantial character to support the findings on this phase of the case. Though the record shows that International, Anaconda Lead and Anaconda Sales are wholly owned subsidiaries of petitioner and in September 1947, at a date after International had withdrawn from the field, Anaconda, Anaconda Sales and International were controlled by interlocking boards of directors and officers, there is no evidence which militates against the existence and activity of these subsidiaries as separate entities at any time pertinent to this inquiry. Thus, though the evidence tends to prove the incidents of a parent-subsidiary relationship, a fact which has never been in dispute, the closely correlated operation of International and Anaconda Sales reflects no sinister connotation of domination by their common parent, keeping in mind that the only function for which Anaconda Sales was organized was to sell products produced by International in certain western states in which the latter was not licensed to do business.

These sparse gleanings from the record fail to support the Commission's findings of substantial identity. To come within the applicable rule, there must be evidence of such complete control of the subsidiary by the parent as to render the former a mere tool of the latter, and to compel the conclusion that the corporate identity of the subsidiary is a mere fiction.

The evidence in the instant case falls far short of that required by the courts in order to hold the parent corporation liable when given a reasonable and impartial construction. It appears that the things done by Irving Goldfeder were done as vice-president in charge of operations of Hunt Foods of Ohio, Inc. He was discharging duties and responsibilities which go with that position. Nowhere is there any evidence that the parent company, in any way, participated in any of the matters complained of. There is no evidence of complete control (or, in fact, of any control whatever) of the subsidiary by the parent. Just what the relationship between the corporations was is not disclosed by the record. Counsel supporting the complaint twice called Mr. Goldfeder to the stand; they had access to the books and records of both corporations. If there was a situation not disclosed by the record, it could easily have been discovered. To hold Hunt Foods, Inc. liable for the acts of its subsidiary under the record in this case would be to ignore the repeated decisions of the courts on this subject.

The hearing examiner decided this phase of the case correctly. His findings and conclusions thereon are adopted as the findings and conclusion of the Commission and the appeal of counsel supporting the complaint as to this phase of the case is denied.

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(3) *Dismissal of the complaint without prejudice and failure to issue an order against certain respondents*

Complaint herein was filed on May 21, 1952. The hearing examiner said:

In view of the definite discontinuance of the foregoing acts and practices by the respondent processors before the complaint in this case was issued, and the fact that they have not been committed for more than four years since, and the strong position that the Co-op now occupies in the industry as a bargaining agent for its member tomato growers in the Ohio area, it is believed that the Commission would be justified in assuming from the facts disclosed that the respondents will not again attempt to engage in these acts and practices in this industry and therefore it would not be in the public interest for the Commission to issue an order to cease and desist at this time. In this connection, counsel in support of the complaint concedes that respondents probably will not renew their unfair acts and practices in Ohio again but urges there should be an order to cease and desist to prevent them from engaging in those activities against any other growers organization.

The fact that a respondent has discontinued illegal practices even prior to the issuance of a complaint does not prevent the Commission from issuing a cease and desist order. In such cases, the Commission must exercise its discretion in view of all the circumstances. *Guarantee Veterinary Company v FTC* (1922), 285 Fed. 853. In addition to the discontinuance of the illegal practices, the Commission should consider the likelihood of those practices being resumed in the future. The guiding principles are well expressed in *Eugene Dietzgen Company v FTC* (1944), 142 F. 2d 321, in the following language:

The propriety of the order to cease and desist, and the inclusion of a respondent therein, must depend on all of the facts which include the attitude of respondent towards the proceedings, the sincerity of its practices and professions of desire to respect the law in the future and all other facts. Ordinarily the Commission should enter no order where none is necessary. This practice should include cases where the unfair practice has been discontinued.

On the other hand, parties who refused to discontinue the practice until proceedings are begun against them and proof of their wrongdoing obtained, occupy no position where they can demand a dismissal. The order to desist deals with the future, and we think it is somewhat a matter of sound discretion to be exercised wisely by the Commission—when it comes to entering its order.

The object of the proceeding is to stop the unfair practice. If the practice has been surely stopped and by the act of the party offending, the object of the proceedings having been attained, no order is necessary, nor should one be entered. If, however, the action of the wrongdoer does not insure a cessation of the practice in the future, the order to desist is appropriate. We are not satisfied that the Commission abused that discretion in the instant case.

In *Goshen Manufacturing Company v. Myers Manufacturing Company*, 242 U.S. 202, a suit based on infringement of a patent, it appeared that defendant had sold the factory before the suit was filed with no present intention of resuming manufacturing. Nevertheless,

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he was still attacking the validity of the patent so an injunction was held proper. In *Sears, Roebuck & Company v. FTC* (1919), 258 Fed. 307, respondent had discontinued the illegal practices before complaint issued and in its answer alleged it had no intention of resuming them. Nevertheless, it contended that its acts were not illegal because the law was unconstitutional. A cease and desist order was held proper.

In the matter of *Wildroot Company, Inc.* (1953), Docket 5928, it appeared that the respondent had subscribed to the Trade Practice Conference Rules for the Cosmetic and Toilet Preparations Industry, which Rules adequately covered the practices complained of. There was also in the record a declaration under oath of respondent's vice president and general manager that the respondent had no intention of resuming the practices. The complaint was dismissed without prejudice.

In *Argus Cameras*, Docket 6199, 1954-55 Trade Cases, § 25, 196, the Commission pointed out that dismissal of a complaint because of discontinuance of claimed illegal practices should not be done unless there is a clear showing of unusual circumstances which in the interest of justice requires it. In that case, the Commission found that the course of dealing over the years between Federal Trade Commission representatives and Argus was such as to justify respondent in the belief, prior to the issuance of the complaint, that no challenge was being made to its practices. It also appeared that respondent discontinued the practices promptly after the complaint was filed "in order to comply with the direction of the Commission" and filed affidavits agreeing to refrain in the future from the acts complained of.

In the present case, it is clear that respondents did cease the practices complained of prior to the issuance of the complaint and have not renewed them. Nevertheless, they have at all times insisted that their course of conduct did not violate the law. No affidavits or statements appear in the record indicating a clear intention to refrain from the practices found to exist. The fact that the Co-op now occupies a strong position in the industry as a bargaining agent is a circumstance to be considered, but we do not consider it sufficient. No criticism is to be made against respondents for vigorously defending the position they had taken. This, of course, they had a right to do. Our conclusion simply is that the facts in this particular case do not warrant a dismissal without prejudice; on the other hand, we think an order based on the findings should be issued.

The appeal of counsel supporting the complaint on this phase of the case is granted and it is directed that a proper order issue against the following respondents:

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H. J. Heinz Company; Campbell Soup Company; Joseph Campbell Company; Stokely Van-Camp, Inc.; Bauer Cannery, Inc.; Foster Canning, Inc.; Hirzel Canning Company; Lake Erie Canning Co. of Sandusky; J. Weller Company; Winorr Canning Company; Hunt Foods of Ohio, Inc.

As to all other respondents, the complaint is dismissed.

Commissioner Anderson dissented to the dismissal of the complaint as to respondent Hunt Foods, Inc.

Commissioner Kern did not participate in the decision herein.

OPINION OF COMMISSIONER ANDERSON CONCURRING IN PART WITH AND
DISSENTING IN PART FROM THE OPINION OF THE COMMISSION

I am in agreement with the opinion of the Commission in this matter except as to the section thereof in which the hearing examiner is upheld in that portion of his initial decision which proposed to dismiss the complaint against one of the respondents, Hunt Foods, Inc. I respectfully dissent from the views which are expressed in the opinion and that part of the order for dismissal as to this corporate respondent.

The position taken in the Commission's decision is that the record does not support findings by the Commission that respondent Hunt Foods, Inc., the parent corporation of respondent Hunt Foods of Ohio, Inc., is responsible for the acts, practices and methods of record of the latter.

From my examination, study and consideration of the record I would have the Commission find the requisite responsibility by Hunt Foods, Inc., for the acts, practices and methods of its respondent subsidiary to include the parent corporation as a party to the Commission's order to cease and desist.

I have an entirely different understanding from that expressed in the Commission's Opinion of the testimony of Mr. Irving Goldfeder, Executive Vice-President of the parent company and Vice President of its respondent subsidiary which is quoted in that opinion. In addition to these I find many other parts of the record to support my dissent on this aspect of the case.

Hunt Foods, Inc., is a corporation with headquarters at 1747 West Commonwealth Avenue, Fullerton, California. It is in the business of purchasing fruits and vegetables, which it processes for market in glass and can containers and which it sells and distributes throughout the United States. One of the principal aspects of this business is that of purchasing, and processing tomatoes into catsup.

Hunt Foods, Inc., which I shall refer to sometimes as "Hunt," has three subsidiaries: Hunt Foods of New Jersey, Inc.; Hunt Foods of

Utah, Inc.; and respondent Hunt Foods of Ohio, Inc., which I will refer to sometimes as "the Ohio company." Hunt owns the controlling stock in each of these subsidiaries. It owns at least 90 percent of the stock in the Ohio company.

Mr. Irving Goldfeder, who maintains his office at the California headquarters of the parent corporation, is *Executive* Vice President of Hunt, Vice President of the Ohio company and Vice President of the other subsidiaries in Utah and New Jersey.

On the point involved herein, it is important to note that Irving Goldfeder was not merely an officer of the respondent parent and subsidiary. He was *Executive* Vice President of the parent. As such he was answerable to the President and Board of Directors of the parent corporation (CX 21, p. 4). His duties as Executive Vice President of the parent corporation were the same as his duties as Vice President of the Ohio company and as Vice President of the other subsidiaries, namely, (1) in charge of production, (2) establishment of policy, and (3) setting of prices. (CX 21, pp. 3, 4, 5, 12, R. 4005, 4007, 4008.)

Hunt, the parent, operated plants directly in the Pacific Coastal States for the processing, selling, and distributing of fruits and vegetables. Hunt operated indirectly through the aforesaid three subsidiaries, including respondent Ohio company, through other parts of the nation.

That the operation of the parent corporation and its subsidiaries was integrated and as such was national in scope is clearly indicated by a statement made by Mr. Goldfeder at the hearing in Los Angeles on July 11, 1952. The hearing examiner was exploring the question of when and where hearings would be held, having in mind, the convenience of all parties to the action. Mr. Goldfeder stated (R. 24).

If I may add to that, we have *other* national companies involved, who will be in the same position, for they operate not only in the State of Ohio, but they operate elsewhere, and with the nature of *our business* the perishable features, it would certainly be helpful to all if it could be postponed until November, early in November will be satisfactory. [Emphasis supplied.]

This statement of the Executive Vice President of the parent corporation should be considered in the light of the fact that the Ohio company operates only one plant, which is located in Toledo, Ohio, and which is confined as indicated above to the production of tomato catsup. That operation could in no wise be considered as a nationwide operation as could the operation of the parent and its subsidiaries.

There are many other admissions in the record which support the view that Hunt merely operates its subsidiaries as local units or divisions.

The numerous so-called "Hunt documents," which consist of letters written by Thomas N. Norris, the local plant manager, which are addressed to Mr. Irving Goldfeder, *Hunt Foods, Inc.*, Fullerton, California (of which there are 36 in number), the replies of Mr. Goldfeder, and other documents, were all secured as a result of subpoenas served upon Mr. Irving Goldfeder, Hunt Foods, Inc., at his headquarters in California where the files are located from which the documents were taken.

In Goldfeder's testimony in this matter, he describes the operations of the parent corporation, Hunt, and that of the Ohio company, stating that the production of tomato products, i.e., catsup, of the Ohio company was 3.5 percent of the total production of the Hunt companies (R. 4010). It is clear, when all of Mr. Goldfeder's testimony is considered together, that the Ohio operation was merely one in an integrated whole and looked upon as local, or merely a phase of the whole of the Hunt company business. Following are some of the significant statements made by Mr. Goldfeder which lead me to this inescapable conclusion:

Well, I can estimate it from this standpoint that in the organization we have—we had six—seven—catsup bottle lines, of which one was in Ohio. So *even if we ran them all, in the same relationship to Ohio, had we run them all in the same relationship*, the Ohio company would have had somewhere around one-seventh of the total catsup production. [Emphasis supplied.]

Is it not crystal-clear that Mr. Goldfeder using the word "we" refers to an integrated operation of the parent and the subsidiaries? Could there be any other meaning given to the words "we ran" and "we run" than that which is given them through common understanding of the English language? Could the words "we run" as used by Mr. Goldfeder in this testimony mean anything other than that the operations of Hunt and its subsidiaries were operated through integration, with the subsidiaries treated as local units under the domination and control of the parent corporation? Mr. Thomas N. Norris, who is in charge of the Toledo, Ohio, plant, is referred to constantly throughout the record as the local plant manager. Mr. Goldfeder, testifying concerning how Mr. Norris came to be associated with the Ohio company, stated (R. 4012, 4013):

Q. Now, with reference to the plant manager, Mr. Norris, did he receive instructions from you as to his duties and authority?

A. That's right.

Q. Mr. Norris first came with the Toledo plant in 1950; did he?

A. He was *transferred* from another area I think the winter of '49, and 1950 was the first season that he operated the Ohio plant.

Q. At that time, that is, when he commenced his duties, which included the supervision of the Toledo cannery and the procuring of tomatoes, did you give him some instructions as to his duties and authorities?

A. Considerably.

See, when he—if you pardon me—when he was *transferred* from New Jersey to Ohio he assumed new duties and new responsibilities which should have been and could have been unfamiliar to him. He had been operating a plant as plant superintendent, and when he took complete charge of this operation it would add responsibilities and duties, such as purchasing of commodities, including tomatoes with which he should not have been too familiar. And it would follow, necessarily, that we would keep in close touch, and I would be constantly instructing him as to how to operate *that phase of the business*.

Q. Did you give him, in the form of writing or a telegram, some instructions with reference to his authority and responsibility with reference to the dealing with growers and securing the tomatoes that were needed for the 1950 and 1951 pack?

A. Unquestionably. [Emphasis supplied.]

Here Mr. Goldfeder who was Executive Vice President of the parent, is testifying that Mr. Norris was “transferred” from New Jersey to Ohio. Mr. Goldfeder, the witness, was also Vice President of the Ohio company and the New Jersey subsidiary. What reasonable interpretation can be given to his testimony other than that the parent corporation transferred a plant manager from one of its local units to another (the two being corporate in form only)? Certainly it would be inconsistent with the compartmentalized theory of the opinion of the Commission to interpret the testimony as being that the Ohio company transferred a man to itself from the New Jersey subsidiary. The reference to the work to be done by Mr. Norris in Ohio is described by Mr. Goldfeder as “this operation” and “that phase of the business.” Since the only operation carried out by the Ohio company is that of purchasing and processing tomatoes into catsup for sale and distribution, Mr. Goldfeder must have had, in the use of those words, other operations and other phases in mind which were the operations and phases in the other parts of the nation carried on by the parent directly and through the other subsidiaries. Is it reasonable to interpret this testimony by Mr. Goldfeder as coming from him in any other capacity or with any other viewpoint or perspective than that of Mr. Goldfeder the Executive Vice President of Hunt in his role as coordinator and administrator of an integrated program by the parent and its subsidiaries?

In reference to the *modus operandi* of the Ohio company, there appears the following testimony (R. 4021):

Q. Did you receive further reports from time to time from Mr. Norris with reference to the progress that he was making, or the lack of progress, in signing up acreage in Ohio?

A. Yes, I was in constant touch with him to keep abreast of developments, if any, and insisted that he do the same *in the local area* to keep me posted [Emphasis supplied.]

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Since the Ohio company had only one plant which was located at Toledo, Ohio, and which purchased tomatoes in Ohio and Michigan, which apparently was the "local area" referred to by Mr. Goldfeder, is it not reasonable to infer from his testimony that he is again speaking in his capacity as Executive Vice President of Hunt and having in mind at the time of his testimony the picture of the integrated operation of the Hunt companies as a whole?

Mr. Goldfeder further testified (R. 4019):

Q. And when you received that information did you give Mr. Norris any instructions as to what he should do with reference to negotiating with the Cannery Growers?

A. I told him to reject it, and if they ever have any more realistic price, if they want to come around and give *us* a more realistic price, why, *we* would be glad to listen to it and he could report it to me, but *we* were totally disinterested in purchasing tomatoes at the price requested.

Hearing Examiner HAYCRAFT. Was that information given to him in writing or over the telephone?

The WITNESS. I can't recall. I would say it was telephoned.

But I was kept posted of this constantly, because it was quite important to *us*. So I kept my finger on it constantly. [Emphasis supplied.]

The use of the words "us" and "we" support a reasonable inference that Mr. Goldfeder is referring to the integrated operations of the parent corporation and the Ohio company.

All of the actions of Mr. Thomas N. Norris, who described himself as Vice President of the Ohio company, were subject to the detailed guidance and instruction of Mr. Goldfeder. As indicated by the above testimony of Mr. Goldfeder, Norris came into the Ohio company inexperienced in this phase of Hunt's business. Goldfeder broke him in and guided his every movement. Shortly after Norris took over his duties, he received a wire from Goldfeder reading as follows: "Keep me posted any gossip or factual tomato prices to growers by competitive canners." Thereafter, Norris frequently wrote to Goldfeder, addressing him as "Mr. Irving Goldfeder, *Hunt Foods, Inc.*, Fullerton, California" [emphasis supplied].⁹ Norris signed each of these letters under the following caption: "Hunt Foods of Ohio, Inc., Formerly The Harbauer Co." Mr. Norris was looking to Mr. Goldfeder, as Executive Vice President of the parent corporation, for instructions and was reporting to him in accordance with those instructions. These letters are appropriately referred to in one of the portions of the Commission's Opinion with which I agree, as follows:

Letters from Mr. Thomas N. Norris, Plant Manager of respondent Hunt Foods of Ohio, Inc., to his superior, Irving Goldfeder, Vice-President of Hunt of Cali-

⁹ CXs 1-A, 3-A through 15-A, 17-A, 18-A, 20-A, 102-A through 107-A, 109 through 116-A, 118-A through 121-A, 124-A.

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for California, are also in evidence. In these letters, Mr. Norris gave a report on the happenings shortly after they occurred. For example, in a letter of April 2, 1951, he reported the efforts of some canners to get their acreage and other matters.

That portion of the Commission's Opinion then continues the discussion and analysis of these letters in support of the Commission's Order to Cease and Desist.

Norris was also in almost daily communication during the busy season with Goldfeder by telephone and telegraph, either to receive instructions or to report the details of current developments.

Norris testified in part as follows (R. 1618-1620):

Q. I believe you stated your superior was Mr. Goldfeder, whose offices are in California?

A. Mr. Irving Goldfeder, yes, sir.

Q. Was there some limitations upon your authority as plant manager?

A. Yes, sir.

Q. With reference to the fixing of the price that would be paid growers for tomatoes, what was the fact in that regard?

A. *I would have to have permission from California* before I could so state a price. [Emphasis added.]

Q. And that was true in 1950, '51 and '52?

A. Yes, sir.

Q. What, with reference to questions of policy, that is, general policy?

A. I don't think I quite understand you.

Q. Well, for example, whether you would deal with the Growers Association or not, was that a matter in which you had authority or not?

A. Well, I'd have to have some authority from Mr. Goldfeder on that.

* * *

Q. Was that a field in which you did receive instructions from California?

A. Yes, sir.

Q. With respect to the instructions which you received from your California superior, what was there with reference to making reports?

A. Well, California does have to be informed of all going on, I mean regardless as to whether it is just inside the plant or outside the plant, in reference to contracting acreage, if that's what you mean. It is my duty to inform Mr. Goldfeder of whatever may come up.

No other conclusion can be reached from a reading of the whole record than that Mr. Norris, the plant manager at Toledo, was merely a local agent operating the Ohio company as a division in accordance with complete control and dominance by the parent corporation. Norris testified he was a Vice President of the Ohio company (R. 1551); and that he made reports to Joseph A. Harmon at the address of the parent corporation but did not know whether Harmon was an officer (R. 1475). Goldfeder testified (R. 4033):

Q. Well, did anybody in the Hunt employ of either the Ohio or the parent company have such talks or understandings, to your knowledge?

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A. Well, Mr. Norris should have had conversations with some of our competitors, but no understandings. Those were my instructions.

The theory which is presented by the language of the Commission's Opinion, that Mr. Goldfeder, as a practical matter, had the various operations of the parent and the subsidiaries tightly compartmentalized in his mind is, I believe, inconsistent with other of his testimony. In a deposition taken from Mr. Goldfeder in this matter, he was being asked about the telegrams and correspondence which passed between himself and Mr. Norris, a number of which were found in the files of the parent corporation and are in evidence in this proceeding. Mr. Goldfeder, whose office and desk are the same for each of his titles, stated as follows: (CX 21, pp. 9-11):

Q. In the course of your business relationships with Hunt Foods of Ohio, Inc., have you ever sent any telegrams to Mr. Norris?

A. Unquestionably.

Q. Did you retain copies of those telegrams?

A. I assume so.

Q. Where are those?

A. They should be in the files.

Q. Were the telegrams that were received by you from Mr. Norris and the copies of the telegrams sent to Mr. Norris made available for Mr. Sherman's investigation at the time of his visit in your office?

A. I don't recall what correspondence in detail was made available to him. He asked for the correspondence. I called for the files and we gave him the correspondence that was in the files. Bear in mind that I would not attempt to remember, it would be impossible for me to remember all the correspondence that is transacted *between me and our various plants*. We do have a tremendous flow of documents. *We operate numerous plants*, and as the result there is a tremendous amount of correspondence, telephone and telegrams. Offhand to attempt to remember any one or any several particular telegrams or letters pertaining to a general subject matter which unquestionably appears just as a routine business transaction, would be an impossible situation.

Q. Well, any telegrams received by you from Mr. Norris or any copies of telegrams sent by you to Mr. Norris, to your knowledge would they have been placed in the same file where the correspondence was?

A. Should have, yes, sir.

Q. If there are telegrams or copies of telegrams in your file with Mr. Norris, would you now make those available for examination to the accredited representative of the Commission?

A. I see no reason why not. I think, if I may digress here a moment, I think our action with Mr. Sherman would indicate that *we* were quite cooperative in this matter during the time when he called or the time that we had this conference with him.

Q. Mr. Goldfeder, during the period covered by the correspondence produced by your counsel yesterday and today, have you had any telephone conversations with Mr. Norris, of which a memorandum of such conversation was made?

A. *I have numerous telephone conversations with our various plants and plant employees* constantly, particularly during a critical period of either purchasing a major crop or producing a major crop.

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Just to give you a rough idea, I unquestionably transact as much or more business over the phone as I do by correspondence, so I did have numerous telephone conversations with Mr. Norris. [Emphasis supplied.]

And he testified further (CX 21, pp. 12 and 13) :

Q. * * * Under whose control are matters of policy with respect to the purchases of Hunt Foods of Ohio, Inc.?

A. Mine.

Q. Under yours?

A. Yes, sir. That is, I supervise and am responsible for the proper operation of that *function of the company*.

Q. If matters of policy of an urgent nature arise, they are referred to you, as a general practice by Hunt Foods of Ohio, Inc.?

A. If they are not in the general run of instructions within reasonable limits, they would be referred to me for discussion and approval [emphasis supplied]; also, the testimony which has been quoted in the Opinion of the Commission which I interpret differently (CX 21, p. 5) :

Q. What is the relationship between Hunt Foods of Ohio, Inc. and Hunt Foods, Inc.?

A. Well, it is practically wholly owned, it is well over 90 percent owned by Hunt Foods, Inc. That is of record.

Q. And as nearly a wholly-owned subsidiary, who exercises the control over the management and operation of Hunt Foods of Ohio, Inc.?

A. Hunt Foods, Inc.

Q. Hunt Foods, Inc.?

A. Yes, sir;

and (R. 4035) :

Q. You control the operations of Hunt Foods in Ohio, do you?

A. I do.

Q. The Hunt Foods Company of California—

A. They control the stock; I directed the operations.

The conclusions drawn by the respondents in their motion to dismiss support my position on the question of this aspect of control by and the responsibility of Hunt. They summarize the evidence of record in this motion to dismiss filed jointly by the parent and the Ohio company. Throughout the motion to dismiss, the two respondents refer to themselves in the singular through the words "Hunt" and "it." For example, speaking together in the motion to dismiss, the two respondents say :

Our basic proposition, indelibly supported by the record made by complainant counsel, is that no trier of the facts can find or remotely infer that Hunt was a conspirator. As to *it* the story is explicit and complete. *For it operated in Ohio through Mr. Norris*, who had no authority of his own, but who instead constantly reported to and sought direction from his California superior by letter. Every letter he wrote discloses his lack of authority—his lack of knowledge as revealed in his constant assemblage of gossip, rumors, often inaccurate third or fourth hand statements, newspaper clippings, reported (and constantly

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changing) price announcements by others—and his obvious bewilderment and apprehension as to what either his competitors or the Growers Association was doing that might affect his dealings with his own growers. [Emphasis supplied.]

* * *

Any reader of these letters and of the Norris testimony can readily perceive that one who is an agent in a remote area—who constantly pleads for minute directions as to every phase of his negotiations with growers, his boxes, his tomato plants, his open market purchases, his legal position in contracting, with every detail of his operations controlled from California—both wholly lacked authority, and as an employee would not have had the temerity to attempt to commit his company to the double-barrelled conspiracy alleged in Paragraph Ten.

The relatively insignificant position of Hunt in the area combines with the newness of Norris in Ohio to confirm the obvious. * * *

* * *

To begin with, both Hunt and its battered plant manager Norris need to be put in perspective. * * *

* * *

Fundamentally, Hunt's only possible connection with the allegations of this complaint can lie in its pricing policy on tomatoes in 1951, the attendance of Norris at four of the meetings at which the economic hold-up of the Growers Association was discussed, and his over-all reporting of the 1951 season. * * *

The *dicta* of the United States Court of Appeals for the Seventh Circuit in *National Lead Company, et al. vs. FTC*, decided December 1, 1955, which is quoted in the Commission's Opinion to support the dismissal of the complaint as to Hunt Foods, Inc., represents in my opinion an extreme position. Nevertheless, I feel that the facts of record in this matter are such that the parent corporation comes within the applicable rule set out in that *dicta* that:

* * * there must be evidence of such complete control of the subsidiary by the parent as to render the former a mere tool of the latter, and to compel the conclusion that the corporate identity of the subsidiary is a mere fiction.

The Commission's Opinion also cites and discusses *Press Co. v. N.L.R.B.*, 118 F. 2d 937, and *Owl Fumigating Corp. v. California Cyanide Co., Inc.*, 30 F. 2d 812. The *Press* case was a National Labor Relations Board case having to do with labor problems. The *Owl Fumigating Corp.* case was a patent infringement case. I feel that these are not the most reliable precedents on this point in the anti-trust field.

In *U.S. v. United Shoe Machinery Company*, 234 Fed. 127, 140-143, which is an antitrust case, the court clearly stated the applicable law on the point, citing numerous supporting cases. The District Court's Opinion in the *United Shoe Machinery* case was affirmed by the United States Supreme Court, 258 U.S. 451, 42 S.Ct. 363. In the *United Shoe Machinery* case the question arose as to whether or not there was proper joinder of parties in a situation in which a New

Jersey corporation owned 98 percent of the capital stock of one of the parties, which in turn owned the entire capital stock of a Maine corporation. In that case as in this case, the officers and directors were practically the same, all of them serving as officers and directors in at least two of the corporations and some in all three. The charge in the complaint was that leases of the United Shoe Machinery Company were in restraint of trade. It was claimed that, as each corporation was an entity and there was no charge of conspiracy, the mere fact that they were owners of the capital stock of the Maine company, the offender, would not justify their being made parties defendant. The situation in this case is even stronger because there is a charge of conspiracy here.

In the *United Shoe Machinery* case the court reviewed the past history of the law of joint liability of related corporations and pointed out that the courts, and especially the courts of equity, will look behind the corporate fiction and, if it clearly appears that one corporation is merely a creature of another, controlling it as effectively as it does itself, it will be treated as the practical owner of the corporation, when necessary for the purpose of doing justice. The court cited the case of *McGaskill v. United States*, 216 U.S. 504, 514, 30 S.Ct. 386, 391, in which Mr. Justice McKenna, who delivered the opinion, said:

Undoubtedly a corporation is, in law, a person or entity entirely distinct from its stockholders and officers. It may have interest distinct from theirs. Their interests, it may be conceived, may be adverse to its interest, and hence has arisen against the presumption that their knowledge is its knowledge the counter presumption that in transactions with it, when their interest is adverse, their knowledge will not be attributed to it. But while this presumption should be enforced to protect the corporations, it should not be carried so far as to enable the corporation to become a means of fraud or a means to evade its responsibilities. A growing tendency is therefore exhibited in the courts to look beyond the corporate form to the purpose of it, and to the officers who are identified with that purpose. Illustrations are given of this in *Cook on Corporations*, §§ 663, 664, 727. The principle was enforced in this court in *Simmons Creek Coal Co. v. Doran*, 142 U.S. 417 (12 Sup. Ct. 239, 35 L. Ed. 1063).

Along this same line, the court cited many other cases.

In *Northern Securities Company v. United States*, 120 Fed. 721, 725, 726 (affirmed by the U. S. Supreme Court, 193 U.S. 197, 24 Sup. Ct. 436), Circuit Judge Thayer, who delivered the opinion of the court, said:

It will not do to say that, so long as each railroad company has its own board of directors, they operate independently, and are not controlled by the owner of a majority of their stock. It is the common experience of mankind that the acts of corporations are dictated and that their policy is controlled by those who own the majority of their stock. Indeed, one of the favorite methods in these

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days, and about the only method, of obtaining control of a corporation, is to purchase the greater part of its stock. * * * The fact that the ownership of a majority of the capital stock of a corporation gives one the mastery and control of the corporation was distinctly recognized and declared in *Pearsall v. Great Northern Railway*, 161 U.S. 643, 671 (16 Sup. Ct. 705, 40 L. Ed. 838).

Where one corporation is the mere agent or instrumentality or department of another company, "the courts will look through the forms to the realities of the relation between the companies as if the corporate agency did not exist and will deal with them as the justice of the case may require," *United States v. Reading Co.*, 253 U.S. 26, 62, 63. See also *Bishop v. United States*, 16 F. 2d 410, 415; *So. Pac. Terminal Co. v. Int. Comm. Comm.*, 219 U.S. 498, 31 S. Ct. 279, 55 L. Ed. 310; *United States v. Del., Lack. & West R R. Co.*, 238 U.S. 516; 35 S. Ct. 873, 59 L. Ed. 1438; *Chicago, M. & St. P. Ry. Co. v. Minn. Civic Assn.*, 247 U.S. 490, 38 S. Ct. 553, 62 L. Ed. 1229; *Chicago & C. Ry. v. Des Moines & C. Ry.*, 254 U.S. 196, 41 S. Ct. 81, 65 L. Ed. 219; *Lehigh Valley R. Co. v. Dupont (C.C.A.)*, 128 F. 840; *The Willem Van Driel, Sr. (C.C.A.)* 252 F. 35; *Linn and Lane Timber Company v. United States*, 236 U.S. 574; *State ex rel. v. Standard Oil Co.*, 30 N.E. 279.

For these reasons, it is my opinion that the complaint should not be dismissed as to respondent Hunt Foods, Inc.

ORDER TO CEASE AND DESIST AND TO FILE REPORT OF COMPLIANCE

Counsel supporting the complaint and certain respondents having respectively filed their cross appeals from the initial decision of the hearing examiner in this proceeding, filed August 9, 1955, and the matter having been heard by the Commission on briefs and oral argument; and

The Commission having rendered its decision in which it denied respondents' appeal, granted in part and denied in part the appeal of counsel supporting the complaint, dismissed the complaint as against certain of the respondents, and directed entry of an order to cease and desist as against certain other respondents:

It is ordered, That the findings of fact and conclusions, excepting those conclusions that the complaint should be dismissed without prejudice because of the discontinuance of the practices involved, as contained in the hearing examiner's initial decision be, and they hereby are, adopted as the findings of fact and conclusions of the Commission; and

It is further ordered, That the complaint be, and it hereby is, dismissed as to corporate respondents, Gibsonburg Canning Company, Inc., Sharp Canning Co., Hunt Foods, Inc., and as to the individual

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respondents, Joseph J. Wilson, Howard E. McKinley, Everitt E. Richard, Cyril P. Roberts, Edgar W. Montell, Harold R. Collard, Herbert F. Krimendahl, Samuel Hammond, Russell Kline, A. A. Ehrman, George W. Conelly and George Wenger, in their individual capacities; and

It is further ordered, That respondents, H. J. Heinz Company, Campbell Soup Company, Joseph Campbell Company, Stokely Van-Camp, Inc., Bauer Cannery, Inc., Foster Canning, Inc., Hirzel Canning Company, Lake Erie Canning Co. of Sandusky, J. Weller Company, Winorr Canning Company, and Hunt Foods of Ohio, Inc., their respective officers, agents, representatives and employees, directly or through any corporate or other device, in or in connection with the procuring, purchasing or contracting for the purchase of raw tomatoes in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination or conspiracy between or among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following acts or things:

(a) Refusing to grant recognition of or to negotiate or deal with Cannery Growers, Inc., an association of tomato growers, as a bargaining agent for its grower members;

(b) Refusing to purchase or to contract to purchase tomatoes from growers who are members of Cannery Growers, Inc.

It is further ordered, That respondents, H. J. Heinz Company, Campbell Soup Company, Joseph Campbell Company, Stokely Van-Camp, Inc., Bauer Cannery, Inc., Foster Canning, Inc., Hirzel Canning Company, Lake Erie Canning Company of Sandusky, J. Weller Company, Winorr Canning Company, and Hunt Foods of Ohio, Inc., shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

Commissioner Anderson dissenting as to dismissal of the complaint as to respondent Hunt Foods, Inc., and Commissioner Kern not participating.

Decision

IN THE MATTER OF

P. SORENSEN MANUFACTURING CO., INC.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (a) OF THE
CLAYTON ACT

Docket 6052. Complaint, Oct. 16, 1952—Decision, June 29, 1956

Order requiring a manufacturer of automotive products and supplies, with factory at Woodside, N. Y., and warehouses in ten principal cities of the United States, to cease discriminating in price between two classes of wholesale customers competing with each other in three Texas cities through use of

- (1) A "warehouse distributor's sales agreement" applying to some 50 customers accounting for 25% to 30% of respondent's domestic sales based upon minimum annual purchases of \$12,000 net, who were granted a 20% discount off the current distributor's prices on each factory purchase and 10% on each warehouse purchase; and
- (2) An "authorized distributor's agreement" made with some 450 to 500 other customers who purchased approximately 60% of respondent's products, providing that the customer purchase a minimum of \$1,200 of respondent's ignition parts line annually, in consideration of which he received a 10% discount from the current distributor price and a "performance rebate" of 3% on annual purchases of \$3,000 to \$5,999, and 5% on \$6,000 or more;

Though tabulations made of respondent's invoice data in the three cities showed no general controlling principle in respondent's aforesaid classification of customers whose individual purchases actually varied widely from the contract requirements.

Mr. Eldon P. Schrup and *Mr. Francis C. Mayer* for the Commission.

Mr. James W. Cassidy, of Washington, D. C., for respondent.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The respondent in this proceeding is charged with having violated subsection (a), Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C., Title 15, § 13) by discriminating in price between its customers competitively engaged in the resale of automotive products manufactured and sold by it. After the filing of an answer to the complaint, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of the complaint were received, duly recorded and later filed in the office of the Commission. Proposed findings of facts and conclusions have been submitted by counsel.